

No. 11757  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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TIDE WATER ASSOCIATED OIL COMPANY, a  
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLE-  
HEM STEEL CORPORATION, a corporation,

Appellees.

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**APOSTLES ON APPEAL**

(In Two Volumes)

**VOLUME II**

(Pages 241 to 506, Inclusive)

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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(Testimony of David L. Richardson)

Recross Examination

Q. By Mr. McHose: You have been on quite a number of cargo vessels, have you not, in addition to tankers?

A. Yes, sir.

Q. And you have been on those vessels when they have been working cargo? A. Yes, sir.

Q. And you have seen them with hatches open while cargo was being worked? A. Yes, sir.

Q. And, also, while they were getting ready to work cargo or in between periods of working cargo?

A. Yes, sir; I have seen that.

Q. Now, you received medical care from the Coast Guard and the Naval Hospital during the time you were having your leg repaired, is that true?

A. The Navy done that. The Coast Guard is in the Navy.

Q. You were taken care of in a Naval Hospital?

A. Yes, sir. [155]

Q. And you didn't pay anything for the treatment that you received? A. No, sir.

Q. And you reported to various doctors?

A. Yes, sir.

Q. And you told them what was wrong with you and what your complaints were and what your trouble was?

A. Yes; and they would examine me.

Q. And they made a number of examinations?

A. Yes, sir.

Q. Quite frequently? A. Yes, sir.

Mr. McHose: That is all.

Mr. Gallagher: Nothing further.

Mr. Hon: Nothing further. We will call Mr. Hart.

CHARLES B. HART,

a witness for the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you state your name, please?

A. Charles B. Hart.

Q. Mr. Hart, what was your business or occupation on August 6, 1944?

A. I was in the United States Coast Guard, assigned to the Engineers' Division as an investigator. [156]

Q. Just tell us what your duties included as an investigator.

A. Investigations.

Q. And from whom would you take your orders for investigations?

A. The captain of the port. I was under his command. And, also, the district engineer's office.

Q. Who would you make your report to after making an investigation?

A. To the engineer's office and to the parties concerned.

Q. Mr. Hart, were you called upon at any time, during the evening of August 6, 1944, to make an investigation of an accident happening on the S. S. Frank G. Drum?

A. I was.

Q. And when were you first notified of this assignment?

A. Approximately five minutes after 10:00 on August 6th.

Q. Is that p. m.?

A. P. m.

Q. The night of August 6, 1947?

A. Yes, sir.

Q. Where were you when you received your notification?

A. The Coast Guard Base Headquarters, Wilmington.

(Testimony of Charles B. Hart)

Q. From whom did you receive your assignment? [157]

A. The duty officer in operations at the Base.

Q. And, upon receiving your assignment, what, if anything, did you do?

A. I went to the scene of where the reported accident took place.

Q. And was that the Bethlehem Steel yards?

A. Yes, sir.

Q. Did you actually go aboard the S. S. Frank G. Drum? A. I did.

Q. Can you tell us about what time you went aboard the Frank G. Drum?

A. Approximately 10:30 to 10:45 p. m.

Q. When you went aboard this tanker—that was a tanker, wasn't it? A. I believe it was, sir.

Q. When you went aboard this tanker, did you see someone injured? A. No, sir.

Q. You didn't see Mr. Richardson there at the time, did you? A. No, sir.

Q. In making your investigation, what, if anything, did you do? Just tell the court what you did.

A. Part of it will have to be said in hearsay.

Q. Well, just this— [158]

A. I went to the aforementioned hatch under discussion, on the port side. I was informed that a Coast Guardsman had—

Mr. Gallagher: If your Honor please, we will object to any statement based on hearsay.

Mr. Hon: Your Honor, I think that is proper hearsay.

(Testimony of Charles B. Hart)

Mr. McHose: He can tell what he did and what he saw.

Mr. Hon: Yes.

Q. Tell us what you did and what you saw.

A. I went to the port side of the vessel—

Q. You understand this blueprint, don't you?

A. I do.

Q. I call attention to X-2, or X-3 it is, which purports to be a bunker hatch. Did you go directly to this bunker hatch? A. I did.

Q. When you got there, was the bunker hatch open or closed? A. It was open.

Q. And at that time were there any lights over it?

A. Yes.

Q. And where were those lights placed?

A. You speak in the plural form.

Q. Light or lights.

A. There was a light, as I recall it, above that hatch and a little 'midships. [159]

Q. Was that a portable or a stationary light?

A. I believe it was portable.

Q. Did you see any members or talk to any members of the crew that were on the Frank G. Drum that night?

A. I spoke to two crew members.

Q. Who were the members of the crew?

A. A Mr. Schleef and a Mr. Basango, I believe his name was.

Q. Do you know what the capacity of Mr. Basango was on the ship?

A. He identified himself to me as boatswain on the vessel.

(Testimony of Charles B. Hart)

Q. And what about Mr. Schleef?

A. Chief engineer.

Q. Did you have a conversation with them concerning an accident to David Richardson?      A. I did.

Q. Separately?      A. I believe so.

Q. Take the conversation you had with Mr. Schleef. When did you have a conversation with him?

A. Some time after arrival aboard the vessel, within a matter of minutes.

Q. And where did you have that conversation?

The Court: What did you say his name was, Schleef? [160] How do you spell it?

Mr. Hon: I think I have the spelling. It is s-c-h-l-e-e-f.

The Court: And his capacity was what?

Mr. Hon: Chief engineer.

Q. Who was present at the conversation, as you recall?

A. There is a possibility that Mr. Cannam was present, a lieutenant in the Coast Guard.

Q. You are not sure whether he was present or not? He might have been?      A. I don't definitely recall.

Q. And what was the conversation?

Mr. Gallagher: That is objected to as hearsay and it wouldn't be competent.

Mr. Hon: The purpose of this question is to show knowledge on the part of the members of that stand-by crew, or whatever the crew was called, on the Frank G. Drum, that night of the condition of this hatch at the time that Richardson fell in it, and that they were employed by the Tide Water Associated Oil Company, a corporation, and they had knowledge of the condition, and

(Testimony of Charles B. Hart)

it is for the purpose of knowledge and showing that they had sufficient time to put guards or lights before the accident.

Mr. Gallagher: It is hearsay. [161]

The Court: Why?

Mr. Gallagher: Because it is testimony outside of the presence of the defendant. There is no evidence proving or tending to prove that either one of these men was hired for the purpose of having a conversation with the Coast Guard, as agents of the company. They are extrajudicial statements.

The Court: As a matter of fact, they were agents and servants of the company. were they not?

Mr. Gallagher: For a certain purpose but not for the purpose of having a conversation with somebody after an accident happened.

Mr. Hon: Your Honor, I submit the only way a corporation can have knowledge of a condition such as this is through certain employees who were there for that very purpose. In admiralty, the rules are relaxed, and I have this case with me that I told you about yesterday, and, if there is any question about it, I will submit the case to you.

The Court: Even though the rules were not relaxed, wouldn't that be part of the *res gestae*?

Mr. Hon: Why, certainly; it would be part of the *res gestae*.

Mr. Gallagher: Of course, Mr. Hon will agree to anything your Honor suggests which might lead to a ruling in his favor, but it wouldn't be *res gestae* for this reason and a very simple reason: *Res gestae* means only those spontaneous [162] statements which are made



(Testimony of Charles B. Hart)

without any time to think or cogitate about the matter, and any conversation which takes place after an event has transpired, and the conversation or statement is not a part of the res which is under investigation, then the statement is not part of the res gestae.

The Court: It seems to me that a corporation can act only through its agents and servants. If these people were there on the ship and were the stand-by crew, they were acting in some capacity in behalf of their employer, or, I assume, if they were members of the crew, they were employed as such. And any statements that were made by them I think are competent and material unless you have a direct authority that you would want to quote or read to the court to the contrary.

Mr. Gallagher: I think you could find lots of cases. I didn't anticipate that your Honor would take the view that you have taken with reference to the particular subject matter.

The Court: Possibly, if the boat were individually owned, the situation might be different or might not; probably not. There might be some argument there. But I believe that any conversation with members of the crew would be competent.

Mr. Gallagher: Then, for the purpose of the record, may it be stipulated, if the court agrees, that this entire line of [163] testimony, that is, any testimony that calls for conversations with members of the crew, is deemed to be objected to upon the grounds that I have stated? Is that satisfactory to your Honor?

Mr. Hon: That is satisfactory.

Mr. Gallagher: Is that satisfactory to your Honor?

The Court: That is, the chief engineer?

(Testimony of Charles B. Hart)

Mr. Gallagher: I mean anybody with whom he had conversations.

The Court: Make your stipulation covering this witness.

Mr. Gallagher: That is just this witness; yes.

The Court: Then, you may make a similar objection to another witness.

Mr. McHose: So that the record can be clear, or will be clear, Mr. Gallagher, can we stipulate that the chief engineer of the ship was a Mr. Schleef? That is in accordance with your answers to the interrogatories.

Mr. Gallagher: Yes.

Mr. McHose: In the employ of the Tide Water Associated Oil Company?

Mr. Gallagher: Yes.

Mr. Hon: What is the question, Mr. Reporter?

(Question read by the reporter.)

Q. By Mr. Hon: I will repeat, let's have the conversation. [164]

A. I questioned Mr. Schleef regarding the purported accident and he stated that the hatch had been left unguarded, that is, open; that workmen had been working there from the yard workmen for several days. He criticized them for not having it closely guarded. At the same time, he knew that the hatch had apparently been left unguarded over a period of days.

Q. Did he say whether or not—

Mr. Gallagher: Just a minute. I move to strike out, separately, this part of the answer, "At the same time, he knew that the hatch had been unguarded over a period of several days," upon the ground that that states a conclusion and opinion of the witness.



(Testimony of Charles B. Hart)

The Court: That may be stricken.

Mr. Hon: Yes.

Q. Did he say or make any statements with reference to how long it had been open?

A. Several days.

Q. Did he make any statement with regard to whether it was lighted at the time of the accident or not?

A. I would like to refer to that report.

Q. Do you have it? A. I have.

Mr. McHose: Is this a report which you made at the time [165] of the accident, Mr. Hart?

A. Yes, sir; that is right. This was the memorandum report I submitted, or a copy of it that I submitted, to the engineer's office. There is the heading.

The Court: What is the last question?

(Question read by reporter.)

Q. By Mr. Hon: Have you referred to your report?

Mr. McHose: The question is did he make any statement as to whether it was lighted.

A. No; the statements were that it had not been lighted.

Mr. Hon: He stated that it was not lighted at the time of the accident.

Q. Is that right? A. That is right.

Q. You say you had a conversation with Mr. Bangs? A. Yes.

Q. You said he was the boatswain?

A. Yes, sir.

Q. And when did you have that conversation?

A. Some time between 10:30 and 11:00 p. m. of that day.

(Testimony of Charles B. Hart)

Q. And where did you have that conversation?

A. On board the vessel.

Q. And who was present at that conversation?

A. There is the possibility that Mr. Cannam was present [166] and there might have been Mr. Schleef.

Q. Let's have the conversation.

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and it is not competent evidence in fact and no proper foundation laid.

The Court: Overruled.

Mr. Gallagher: When I refer to foundation, I don't mean the time, place and persons present. I mean there is no evidence proving or tending to prove that the boatswain had any authority to make any statements for or on behalf of Tide Water. It would not be binding on Tide Water.

The Court: He, I understand, was employed by this corporation?

Mr. Gallagher: Yes; he was, your Honor.

The Court: The objection is overruled.

Mr. Gallagher: May we have the same stipulation with reference to the boatswain as we had with reference to Mr. Schleef?

Mr. Hon: What was that?

Mr. Gallagher: That the objection goes to the entire line of testimony.

Mr. Hon: Oh, yes.

Mr. Gallagher: Is that satisfactory to your Honor?

Q. By Mr. Hon: Answer the question. What was the conversation? [167]

A. He identified himself as boatswain of the vessel. He said that he heard cries of help emanating from the

(Testimony of Charles B. Hart)

hatch and went to the hatch in question and saw Richardson trying to pull himself up the ladder from the hold. On further questioning and discussing it with Mr. Basango, he said the hatch was left open and unguarded and unlighted and, further, that the port passageway was well lighted.

Q. Did he say for how long this port bunker hatch, into which Richardson fell, had been left open?

A. Only for a period of several days.

Mr. Hon: You may take the witness.

#### Cross Examination

Q. By Mr. McHose: Mr. Hart, this accident occurred on a Sunday evening, is that correct?

A. I don't recall the day of the week, sir.

Q. It was August 6th? A. Yes, sir.

Q. And it was that same evening that you boarded the ship? A. Yes, sir.

Q. Who was on board the ship when you were there?

A. A Lieutenant Cannam, R. C. Cannam, and Ralph French.

Q. Who was he?

A. A Coast Guardsman who was a photographer assigned to the captain-of-the-port's office, the aforementioned Mr. [168] Schleef and Mr. Basango.

Q. Did you see anyone else on the ship?

A. I don't definitely recall. However, it seems to me like a number of people were aboard at the time I was there.

Q. Did you talk to any other members of the crew of the ship besides Schleef and Basango?

A. Not that I recall, sir.

Mr. McHose: That is all.

(Testimony of Charles B. Hart)

Q. By Mr. Gallagher: Mr. Hart, you don't know who placed that portable light there by the bunker, do you? A. No; I don't.

Q. It was there when you got there?

A. It was, sir.

Q. Can you describe that light so that we will know what kind of a standard it was?

A. I am afraid I can't give you much of a description except to say that it appeared to be rigged up perhaps 12 or 14 feet above the deck and that it cast good illumination on the port side of the vessel.

Q. May I see that report a moment, please?

A. Yes, sir.

Q. Did Mr. Schleef tell you that the workmen employed by Bethlehem had been doing work in and about that particular hatch for several days?

A. He said that workmen from the shipyards had been do- [169] ing work there.

Q. And Mr. Schleef, according to this report, you say, blamed the Bethlehem Shipbuilding employees?

Mr. McHose: Just a moment, Mr. Gallagher,—

Mr. Gallagher: Well, you want the conversation. Now we will get it all.

The Court: This is the first time we have had you gentlemen cross each other.

Mr. Gallagher: Your Honor has ruled that the conversation is admissible. If part of it is admissible, all of it is admissible.

Mr. McHose: No, your Honor. Your ruling is based upon the fact that the statement of an employee of the Tide Water Associated would be admissible, but the state-

(Testimony of Charles B. Hart)

ment in which he attempts to criticize some other party, by whom he is not employed, would not be admissible.

The Court: Let's start all over again. This witness referred to his notes for the purpose of refreshing his recollection in relation to some questions as to whom he discussed this matter with when he went on board. Now, the question is how this memo came into being so far as we are concerned.

Mr. McHose: That is right.

The Court: I think you should confine your cross examination to the matters concerning which there has been testi- [170] mony.

Q. By Mr. Gallagher: Have you given all of the conversation that you had with Mr. Schleef?

A. All that I recall, sir.

The Court: If there are other matters that you wish to inquire into, I am not foreclosing you.

Q. By Mr. Gallagher: Refreshing your memory by reading this down here, commencing with "Schleef"—

Mr. McHose: The point simply is, your Honor, whether it is admissible for this witness to testify as to a conversation he had with an employee of Tide Water Associated Oil Company, in which that employee blamed someone else for an accident that had happened. Obviously, he might very well have said it and probably would try to place the blame on someone else, and my objection is that the witness cannot testify as to a hearsay conversation with someone, in which that person blames another person for an accident that happened. As to the other statements he made, about the absence of lights and about the fact that the place was unguarded and that the hatch was open, I think your Honor ruled cor-

(Testimony of Charles B. Hart)

rectly on. Those were admissions against interest which are properly admissible by this plaintiff as being the employees and representatives of Tide Water Associated Oil Company, but now you are going far afield of that when you allow testimony to be given as to what this man said about the reason [171] why this accident happened and blaming someone else for it.

The Court: That was part of the same conversation—

Mr. McHose: It doesn't make any difference, your Honor. A statement of that kind couldn't possibly be binding on the Bethlehem Steel Company because he is not employed by them. He could testify to what those conditions were but now you are going to the point where he is being asked to give an opinion as to what happened and how the accident was caused, and that wouldn't be admissible even as against Mr. Gallagher and certainly not as against the Bethlehem Steel Company. He wasn't employed by us. Any statements that he made that have to do with us would certainly not be binding on us.

The Court: What is your theory?

Mr. Gallagher: My theory is this. If the evidence which your Honor permitted the libelant to introduce with reference to these conversations is competent proof of knowledge that the bunker hatch was unguarded and was unlighted, then I think that the balance of the conversation is certainly admissible because, if Mr. Schleef told this witness, "Yes; that bunker hatch was being worked on by the employees of Bethlehem and they evidently went off and left it unguarded and unlighted, and it is up to them to take care of it if they are working in that part of the ship," I think that part of it would, likewise, be admissible.



(Testimony of Charles B. Hart)

The Court: I think there is something to the point made [172] by Mr. McHose, that, if this person was not employed by the Bethlehem Steel Company, any statement he might make would not be binding upon his company.

Mr. Gallagher: I thought your Honor ruled that question was *res gestae*.

The Court: I did in so far as your people are concerned, because he was an employee of the company.

Mr. Gallagher: If it is *res gestae*, it is binding on everybody.

The Court: That is one element I haven't ruled upon. I just asked you the question whether it wouldn't be part of the *res gestae* and you argued it wouldn't. However, I ruled it was competent, nevertheless. I am not quite sure whether it was a part of the *res gestae*. It probably is. Whether or not the statement of this individual made at that time would be binding upon his own employer—I am not so sure that it might not be part of the *res gestae*.

Mr. Gallagher: You can't keep out part of a conversation and let in a portion of it if it is admissible for any purpose, and I am offering it for any purpose for which it is admissible. I am not making any conditions at this time with reference to its effect or weight or anything else. We are not arguing the case at this time.

Mr. McHose: There is another reason why this cannot be admissible. Even if this man was sitting here on the witness [173] stand being questioned, he couldn't express an opinion as to the fault for this accident. We are in admiralty and there is no jury here. What the

(Testimony of Charles B. Hart)

man was going to say is that he has expressed an opinion that the Bethlehem Steel Company was to blame. That is purely an opinion of the Tide Water Associated Oil Company.

The Court: Did this statement you are trying to get from the witness refer to facts or does it refer to his expression of an opinion?

Mr. Gallagher: I got the impression that Mr. Hart came to the conclusion that Mr. Schleef was blaming Bethlehem for having left the bunker hatch unguarded and unlighted, if anybody should be blamed, but I doubt very much whether Mr. Schleef used the same words that Mr. Hart has put in his report, and I am trying to find out what the conversation was which led Mr. Hart to come to the conclusion that Mr. Schleef blamed Bethlehem.

The Court: Let's hear the question and then I can tell whether it is competent or not.

A. Will you repeat that last question, please?

Q. By Mr. Gallagher: Have you refreshed your recollection, by reading from the name 'Schleef' at the bottom of the page down to the end of the first paragraph or down to this word here?

A. Would you like to know the conversation with Schleef? [174]

Q. In other words, what was the conversation that led you to put that line in there?

A. The general conversation was that the yard workmen going in and out of those holds all the time and opening various hatches wouldn't use caution to guard them or put up guard rails around them or properly



(Testimony of Charles B. Hart)

light them, and that he, Schleef, couldn't go around following those workmen up in eliminating such hazards.

The Court: That is a mixed answer.

Mr. McHose: I have no objection, your Honor. You are going to decide this case anyway. Obviously, this man would say, "It wasn't my fault and the other men did do it." I have no objection to it. Let it stand.

The Court: Very well. We will take a short recess of five minutes.

(Short recess.)

Mr. Gallagher: I have a couple of more questions I overlooked.

Q. Mr. Hart, the portable light that you found in the place that you have described was not rigged by either you or the photographer, was it?

A. No, sir; it wasn't.

Q. And, when you got there, the hatch had been roped off? A. Yes, sir. [175]

Q. There were lights around it?

A. I am almost certain there were, sir.

Q. Do you know whether the cover was on the stiff leg when you got there? A. I don't recall, sir.

Mr. Hon: I don't know what a stiff leg is.

The Court: I would like to know myself.

Mr. McHose: If the court please, and Mr. Hon, it is this rod here which is on the underside of the hatch, and that can be put in a socket down here and it will be partway opened.

The Court: It acts as a prop?

Mr. McHose: Yes.

The Court: Is there anything further from this witness?

(Testimony of Charles B. Hart)

Redirect Examination

Q. By Mr. Hon: By the way, Mr. Hart, as to this report that you have with you, is this an exact copy of a report that you made and furnished in excess care?

A. Yes, sir.

Q. And this is a part of the official records of the case?

The Court: Is it?

A. To my knowledge, it is.

Q. By Mr. Hon: This is an exact copy of the report that you turned in, is that right? [176]

A. It is, sir.

Mr. Hon: I will offer this as libelant's next succeeding exhibit.

Mr. McHose: It is a report this witness made himself and he was properly permitted to use it to refresh his recollection and testify from. He has testified to all the substantial matters in it. It is not identified as an official record and, even if it was an official record, it would still not be admissible in evidence.

Mr. Gallagher: I object to it as not competent in the case.

Mr. Hon: In view of that, I will withdraw my offer.

The Court: Very well.

Mr. Hon: I have no further questions.

The Court: How many more witnesses do you have?

Mr. Hon: I have another witness and then I have some interrogatories.

(Testimony of Charles B. Hart)

The Court: How many witnesses do you have?

Mr. McHose: We have two witnesses, one of whom will be very brief, and a doctor will be here at 2:30 this afternoon.

The Court: Is there a likelihood we will be able to finish this afternoon?

Mr. McHose: I don't think so, your Honor.

Mr. Gallagher: I expected Mr. Schleef and a master to be [177] here but Mr. Schleef was held up at sea on account of storms, and so was the master. So the master won't be in San Francisco until tomorrow. I am informed that Mr. Schleef is trying to get down here by air today. He had a reservation on the 11:00 o'clock Western Air from San Francisco, but I talked to an executive of the company at San Francisco and he told me it was very stormy up there. I have got three other witnesses here.

The Court: The reason I am asking is that I have a case set for tomorrow and, if there is no likelihood of reaching that case, I want to advise counsel and the litigants in the matter.

Mr. Gallagher: I think we will be going forward with testimony tomorrow, your Honor.

The Court: Call your next witness.

Mr. Hon: Yes, your Honor. I will call Admiral Higbee.

ADMIRAL FRANK D. HIGBEE,

a witness for the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you please state your full name, sir?

A. Admiral Frank D. Higbee, of the Coast Guard, retired.

Q. Were you an active officer in the Coast Guard during [178] World War II?      A. Yes, sir.

Q. When did you retire from that service?

A. The 1st of August of last year.

Q. That would be August 1, 1946?

A. Correct.

Q. How long were you in the Coast Guard?

A. Since 1924.

Q. Over what period of time do your military operations or experience extend?

A. Since 1913, my time has been divided in the Navy between the American Merchant Marine and the Coast Guard, over a period of about 33 years.

Q. What has been your experience in the Los Angeles Harbor area?

A. Before this war, I had two other assignments here, in ships, and, in 1940, I left a job as captain-of-the-port up in Oregon and was assigned here in this area as captain-of-the-port of the Eleventh Naval District harbors.

Q. How long did you continue to be captain-of-the-port of this Eleventh Naval District?

A. Approximately two years.

(Testimony of Admiral Frank D. Higbee)

Q. Now, Admiral Higbee—

A. Pardon me. I may say I came here in 1940 but I was not captain-of-the-port until 1941. [179]

Q. I will ask you whether or not rules are promulgated or regulations are promulgated for tank vessels within the Los Angeles-Long Beach defensive sea area.

A. By order of the Secretary of the Navy, some local rules were ordered to be put out for vessels and shipping within the defensive sea area here, and there was a separate volume for tank ships which I prepared.

Q. Are you the one that actually prepared the orders?

A. Yes, sir.

Q. And you say there was a separate one regulating tank vessels?

A. Yes, sir.

Mr. Hon: While a lull is going on, may I ask the court if Mr. Hart, the last witness before this gentleman, may be excused?

The Court: Do you require him any further?

Mr. McHose: That is agreeable.

Mr. Gallagher: Yes, sir.

The Court: You may be excused.

Q. By Mr. Hon: Disregarding any longhand notation or writing on the outside of the cover, I will ask you what that particular pamphlet is.

A. This is a printed copy of regulations for tank vessels within the Los Angeles-Long Beach defensive sea area as published at the Headquarters and printed at the Headquarters [180] of the Eleventh Naval District.

Q. Is Wilmington in that particular District or Headquarters?

A. It is within that District.

Mr. Gallagher: You mean San Pedro.

(Testimony of Admiral Frank D. Higbee)

Q. By Mr. Hon: Is San Pedro also within that District?

A. Both of them are within that District.

Q. Are those the orders of the captain-of-the-port that were in effect on August 6, 1944?

A. The special local regulations that were prepared were prepared under the authority of Executive Order No. 8953 of the President.

Q. You mean the President of the United States?

A. Yes; I do. And they only lasted until that executive order was rescinded, which I found out just a few days ago was in July, 1946, after the surrender.

Q. So, then, were those in effect then, on August 6, 1944? A. Presumably so.

Q. Well, were they in effect on that date?

A. I believe they were, sir.

Mr. Hon: I offer this—

A. It is a companion volume to regulations for ocean and coastwise vessels, and the regulations for ocean and coastwise vessels are also applicable, in part, to tank vessels. And [181] this is also a companion to a little book which regulates waterfront petroleum facilities; those three things.

Q. This is the one that regulates the tank vessels?

A. Yes, sir.

Q. Or what we call tankers? Is that right, sir?

A. Yes, sir.

Mr. Hon: I offer this as libelant's next succeeding exhibit.

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that those rules and regulations promulgated by the captain-of-the-port are not a basis



(Testimony of Admiral Frank D. Higbee)

of civil liability and do not and cannot furnish a basis for a cause of action for damages for personal injuries. If these regulations are law because of the fact that they were promulgated pursuant to an executive order of the President of the United States, the court takes judicial notice of them anyhow, so that it would not be necessary to offer them in evidence. But, if it is necessary to offer them in evidence for the purpose of calling them to the notice of the court, then we have our objection that they do not furnish any basis whatever of tort liability and they do not and cannot create any duty or obligation on the part of the respondent Tide Water Associated Oil Company toward this libelant, and a failure, if any, to comply with the rules and regulations would not be breach of any duty which the Tide Water Associated Oil [182] Company owed to this libelant.

Mr. Hon: In that respect, your Honor, I might state this—

The Court: Will you tell me what portion of those rules you are referring to when you desire to have this introduced in evidence?

Mr. Hon: Yes; I will be pleased to.

The Court: What do they concern?

Mr. Gallagher: Before Mr. Hon does that, might I add a separate ground that we also object to them, to the particular rules to which you have reference, upon the ground that the libelant is not a person or a class of persons or one of a class of persons for whose bodily safety or protection these rules were promulgated?

Mr. Hon: In answer to your question, your Honor, we particularly have reference to Rule No. 6, which appertains to guards required to be on tankers at specified

(Testimony of Admiral Frank D. Higbee)

times, which would include, we contend, the time the accident happened, and, particularly, to subparagraph f of No. 6, which states, among other things, what the specific duties of the guards on ships shall be and who they shall be.

The Court: Are you talking about persons or some other kind of guards?

Mr. Hon: The guards; that the executive order absolutely requires a human being, an actual person. [183]

In answer to Mr. Gallagher's statement that this would not apply to this case or was not promulgated to apply to the safety of a libelant such as in this action, we contend that that would be a question of fact for the court to determine, first whether or not there was a breach of the orders of the port or the rules of the port, as set forth by the captain-of-the-port. Then, if your Honor should determine there has been a material breach of any of these particular rules, which were required by President Roosevelt, appertaining to this port, then your Honor would determine, as a matter of law or a fact, whether or not there was a causal connection between the breach and the injuries received by this libelant.

The Court: Do these rules have the force of law?

Mr. McHose: I might state our position to be, your Honor, that I think the evidence is perfectly admissible. The rules were promulgated under the presidential order and the authority of the Secretary of the Navy. Every tank vessel coming into this port is absolutely bound to follow those regulations and, if they do not, they can be subject to penalties. Is that right, Admiral Higbee?

A. That is correct.



(Testimony of Admiral Frank D. Higbee)

The Court: The basis, however, for the adoption of these rules is the authority vested in the President, is that correct?

Mr. McHose: That is right. [184]

Mr. Hon: Pursuant to the War Powers Act.

The Court: Is that correct?

Mr. Hon: The War Powers Act.

The Court: And these rules were enacted under that authority?

Mr. Hon: Under that authority; yes sir.

The Court: It seems to me they would have the force of law. Would they not?

Mr. McHose: I agree, your Honor.

The Court: Mr. Gallagher?

Mr. Gallagher: Well, if we assume that they have the force of law, I can call your Honor's attention to an elementary principle. I can give you an example by referring to ordinances. Suppose there is a city ordinance that says there shall be fly catchers in each corner of a room. Now, obviously, those fly catchers wouldn't be required in that corner of the room for the protection of people walking along the floor and, if you didn't have that fly catcher up there and a man got hurt on the floor, he couldn't complain about it because that ordinance is not adopted for the purpose of protecting the man on the floor. One might say several of these regulations were not promulgated for the purpose of laying down rules which were required to be followed for the purpose of protecting men in the Coast Guard. As a matter of fact, President Roosevelt had no authority whatever to make [185] any rule or to authorize the making of any rule which would impose a civil liability

(Testimony of Admiral Frank D. Higbee)

in the event the rule were not followed. In other words, one can do that—

The Court: That is a matter of legal interpretation, is it not? For example, you have mentioned a city ordinance in relation to a damage matter. If, for example, a pedestrian violates a traffic rule, isn't that indicative of negligence on the part of that pedestrian?

Mr. Gallagher: Certainly, because that ordinance was enacted for the purpose of controlling traffic and for the purpose of making the streets safe for pedestrians.

The Court: Isn't this the same situation? Here is a rule adopted for the safety of individuals who are either employed or whoever they may be. Wouldn't that be a similar situation?

Mr. Gallagher: If the President had the authority to do it and if he did it for that purpose, that would be one thing, but the President of the United States, whether it be Franklin Delano Roosevelt or Theodore Roosevelt or anybody else, has no authority whatever to legislate or to adopt anything which has the force of law and which will be the basis of a cause of action for damages on the civil side of the court. If a man violates or a company violates a wartime regulation, the company may be subject to a fine, for instance. But I don't think your Honor has gotten the point that [186] I make with reference to these regulations. My point is not at this time that they have not the force of law. They may have the force of law. My point is that they were not promulgated for the purpose of protecting individuals who might go aboard a ship.

(Testimony of Admiral Frank D. Higbee)

The Court: That is a question of law, is it not, that is before the court, to determine whether they would apply in that particular respect?

Mr. Gallagher: That is correct, but your Honor can't admit them in evidence. They are not evidence of anything.

The Court: If, however, some lawful regulation has been promulgated which would require certain safeguards on board a vessel, I would think that would have considerable to do with the question of negligence.

Mr. Hon: Your Honor, it sets forth the standard of care that is required on these vessels and your Honor can read the rules and see if that standard of care was lived up to by these parties.

Mr. McHose: It is very important in this case because it will assist the court in deciding this case on the question of responsibility as between the two respondents.

The Court: We haven't come to that yet. I think it is competent evidence. May I take a look at them for a moment? Are there any particular portions of this you desire to emphasize? [187]

Mr. Hon: Not at this time, your Honor. That will be in argument.

The Court: This may be received and marked Libellant's Exhibit No. 6 in evidence.

Mr. Gallagher: Your Honor, there seems to be some doubt about whether we have to take exceptions to rulings on the admiralty side. It was my understanding that you do have to do so. The clerk told me that his understanding was otherwise. But, in order to make certain that this particular ruling is properly protected,

(Testimony of Admiral Frank D. Higbee)

I, respectfully, take an exception to the ruling of the court.

The Court: An exception may be noted.

Mr. McHose: Exceptions are not necessary.

The Court: I doubt whether they are necessary because the Rules of Civil Procedure provide—

Mr. McHose: Formerly the rule on the civil side was that you had to save your exceptions.

The Court: However, if you feel that you are in doubt about it, you may note your exceptions.

Mr. Hon: That is all, Admiral.

#### Cross Examination.

Q. By Mr. McHose: Admiral Higbee, I would like to ask you a few questions about these rules. Will you state to the court what the practice was and what the requirements were with respect to the maintenance of guards on board tank vessels [188] which were not in service but were in the shipyard undergoing repairs?

Mr. Gallagher: That is objected to on the ground it calls for the conclusion of the witness. If it is a matter of law, he can't express any opinion, and, if it isn't a matter of law, he is not competent to testify to it.

Mr. McHose: I will lay a foundation by the witness if you don't stipulate to his qualifications.

Mr. Gallagher: He is not an expert in the law.

Mr. McHose: I intend to ask him questions as to the matter of practice and custom.

The Court: If that is regulated by the regulations, isn't that a matter of law and regulation rather than practice? The practice has been incorporated into a law or a regulation.

(Testimony of Admiral Frank D. Higbee)

Mr. McHose: I think that is true.

The Court: And that would be self-explanatory, would it not?

Mr. McHose: Yes. But I think we might be permitted to bring out that the practice has been incorporated in these regulations.

The Court: But I don't see the necessity of that. If this is understood to be a valid regulation pursuant to law, that speaks for itself. Then it becomes a physical fact as to whether that rule has been complied with. [189]

Mr. Gallagher: It is not proper cross examination, either.

Mr. McHose: I will make the witness my own for that purpose. What I offer to prove is, I would like to have the testimony of this witness, for the benefit of the court, to explain what guards are provided on vessels in the situation in which this vessel was at the time, what the duties of those guards were and what their general functions were.

The Court: What is the provision that you have there of the rules? What does that say? You might read this.

Mr. McHose: Regulation 6 states that, "While alongside docks, tank ships will maintain armed guards at all times as follows: The armed guards may be of the crew or of an approved organization from ashore." I would like to ask some questions about how these guards are provided and what they do. His position as captain-of-the port here, your Honor, qualifies him particularly to know just what guards do on board ship and what their functions are, and I think that is important and would be helpful in supplementing the statements here in the regulations. That is my purpose. I think it would help you, to

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decide this case, to understand who provides the guards and what they do.

The Court: The objection is overruled.

Q. By Mr. McHose: When a vessel is in a shipyard and a guard is not on the ship, that is, the full guard, do you [190] know what guards are maintained on the vessel?

Mr. Gallagher: The same objection to this entire line as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McHose: Will you read that question, Mr. Reporter?

(Question read by reporter.)

A. I know what the requirement was. It was required that there would be one licensed officer, and at night, or when the vessel was immobilized, in addition, the three guards required by paragraph 6 of this book.

Q. By Mr. McHose: Was there a gangway guard required?

Mr. Gallagher: The same objection.

The Court: Overruled.

A. There was a gangway guard required.

Q. By Mr. McHose: And was there also what is called a roving guard required?

A. That was a requirement.

Q. Will you describe to the court what the function of a roving guard was?

A. A roving guard was probably or was the most important of all. He was a man not assigned to guard any certain prescribed portion of the vessel but was at liberty and it was his duty to go throughout the vessel. He was a man that was supposed to be instructed in his duties. It was his duty to be responsible and to be resourceful to



(Testimony of Admiral Frank D. Higbee)

safeguard the premises [191] from jeopardies which might come from without or from mishaps which might occur within by just normal happenings or by negligence or careless operation.

Q. Were those guards required to be on duty at all times in 1944? A. Yes, sir.

Q. Who was required to provide those guards, Admiral Higbee?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion and opinion of the witness.

The Court: I am not quite clear now. When you asked the former question as to the requirement of these guards, is that within the rules? If it isn't within the rules, I would like to have that clarified a little better. Who required those guards?

Q. By Mr. McHose: The guards are specified by these rules, are they not? A. They are required.

Q. And are there also not other rules and regulations which cover guards, for instance, rules and regulations under Title 33 of the federal regulations?

A. Those are national rules you speak of now?

Q. Yes, sir. And these are the local rules we are talking about here now? A. Yes, sir. [192]

The Court: I think your best evidence would be those other rules.

Mr. McHose: I agree, your Honor.

The Court: Are those other rules available?

Mr. McHose: They are in the code of federal regulations.

The Court: I think that is the best evidence.

Mr. McHose: Those are federal rules but these local rules are still applicable here in Los Angeles Harbor.

(Testimony of Admiral Frank D. Higbee)

Q. Is that right?

A. These local rules are not applicable now because, since the surrender, an executive order No. 8953 was, I think, rescinded, which knocks the bottom out of any local rules.

Q. But they were effective on August 6, 1944?

A. Yes, sir.

Q. And all of the ships coming into this harbor at that time had to go by those rules, is that correct?

A. Yes, sir.

Mr. Gallagher: At this time evidently this subject matter has been exhausted and I move to strike out the testimony on cross examination and each question and the answer to each upon the ground that each answer states a conclusion and opinion of the witness and is not competent proof of anything.

The Court: If your inquiry concerned the contents of the rules, the number of guards and their duties and all that, [193]. I think this evidence is not competent. I think you should resort to those rules.

Mr. McHose: All right, your Honor; we will rely on the rules, which I think are sufficient.

The Court: That objection may be sustained as to those particular questions.

Mr. McHose: But the rules themselves have been admitted in evidence.

The Court: These rules are admitted.

Mr. McHose: And they will speak for themselves.

Q. Admiral Higbee, I would like to ask you another question. In your capacity as captain-of-the-port, did you have anything to do with the duties performed by Coast Guard inspectors on board ships? A. Yes, sir.



(Testimony of Admiral Frank D. Higbee)

Q. You have been here during the testimony this morning, have you? A. Yes, sir.

Q. And you have heard the testimony of Mr. Richardson? A. Yes.

Q. Did the men who performed that kind of function, which he has described, come under your jurisdiction when you were captain-of-the-port? A. They did.

Q. What was the primary function of those men? [194]

A. The primary function—or it was their duty to go on board vessels and check up to see that the requirements for guarding and other safeguards were being complied with by vessels and by all sorts of marine installations and, also, on their own, to be vigilant for other jeopardies they might see. Those guard duties were not required by Mr. Richardson there, I don't believe. It was not their duty to stay on board and guard the vessel. He was a roving inspector who went from one ship to another to ascertain if the requirements were being met with.

Q. To determine whether there were crews on board, for example?

A. That would be one of their duties.

Q. And to determine whether there were fire extinguishers on board? Would that be one of their duties?

A. That would be one of their duties.

Q. Admiral Higbee, you have had a great deal of experience in connection with ships in your 33 years of service, is that correct?

A. I have a working knowledge of them.

Q. Do you have an opinion, Admiral Higbee, as to whether it is safe practice for a man to go out onto a dark deck of an oil tanker at night, without any kind of a light, and to attempt to walk along that deck?

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: First of all, that is not within the scope of [195] the cross examination.

Mr. McHose: I have already made Admiral Higbee my own witness.

Mr. Hon: All right. We object to that because Mr. McHose is asking this witness, who is now his witness, to assume the functions of this court.

The Court: The objection is sustained.

Mr. McHose: Your Honor, I have qualified Admiral Higbee as an expert.

The Court: Yes, but this witness can't pass upon legal questions.

Mr. McHose: That is not a legal question, your Honor. I have asked this witness, who has had 33 years' experience in connection with ships, whether he has an opinion that it is safe for a man, as a practical matter, to go out and walk on a darkened deck of an oil tanker at night, without a light. He is entitled to express an opinion to that question as an expert witness.

The Court: Have you any authority along those lines? If you have, I would like to see it.

Mr. McHose: I haven't any here but it is obvious to me.      The Court: It is not to me.

Mr. McHose: I could call any witness into this court, I believe, who was an expert shipmaster, and ask him whether he has an opinion about going out on the deck of a ship at night. [196]

(Testimony of Admiral Frank D. Higbee)

The Court: That is what the court is trying to arrive at from the facts in the case, as to whether or not it is safe.

Mr. McHose: But it is helpful for your Honor to know what is good marine practice, what a man who has spent years in this field knows on that subject. That is an opinion on a question of fact.

The Court: You might as well ask a witness in an ordinary negligence case if the person that was injured was negligent.

Mr. McHose: No; you couldn't ask the question that way but I could ask a witness in a negligence case, if I qualified him as an expert, whether it is safe practice to do a certain thing.

The Court: I would like to see some authority on that point. I will admit that is a very novel point.

Mr. McHose: I will be glad to obtain some authorities through the noon hour but I don't like to ask the Admiral to come in again. Mr. Gallagher explained that a safety engineer could be called and asked what is good practice and what is not good practice. This is the same situation.

The Court: I still think it is the function of the court to determine questions of negligence on the part of this libellant or not.

Mr. McHose: I don't want to impose on Admiral Higbee the necessity of coming back this afternoon. [197]

The Court: We can take his answer subject to the ruling.

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: Your Honor, I object to the answer going into the record because it is so clearly invading the province of this court that I don't even think that the record should contain his answer until they convince your Honor the answer is proper. Under the circumstances, I don't think it is right to this libelant to clutter this record up by making a decision that is up to this court.

The Court: The purport of this question is whether it is possible for this man to step out into the dark, is that it?

Mr. McHose: No, your Honor. We are talking about something that peculiarly has to do with ships and Admiral Higbee has spent a lifetime in connection with ships. I am asking him, as an expert, to express an opinion as to whether it is good marine practice for a man to walk around the deck of a tanker at night, in the dark, and I think that his opinion might be helpful to you in deciding this case. I think the question is proper and it might be helpful to you, and I will be prepared the first thing this afternoon to submit authorities in support of the question.

Mr. Hon: Your Honor, I assume that Mr. McHose knew that the question would be asked and he should have had his authorities present at the time, because he could rely on my objection. [198]

The Court: I will take the answer subject to a motion to strike.

Q. By Mr. McHose: Do you understand the question, Admiral Higbee?           A. Yes, sir.

(Testimony of Admiral Frank D. Higbee)

Mr. Hon: There is one of two things. Is this supposed to be a hypothetical question? If it is, then, your Honor, I object to the question further on the grounds that all of the facts are not included in the hypothetical question. To properly put a hypothetical question, you must include all of the facts.

Mr. McHose: It is not a hypothetical question.

Mr. Hon: Then, I object to it as not proper.

The Court: I will receive the answer subject to your motion to strike.

Q. By Mr. McHose: The question was, Admiral Higbee, whether you have an opinion as to whether it is safe—

The Court: Not an opinion. I won't let you ask that question. But whether it is good practice or whether it is an accepted practice, or something along those lines. Whatever the practice may be, I think you can introduce evidence on.

Mr. Hon: May I take the witness on voir dire?

The Court: I think we had better take our noon recess. Then, that will give Mr. McHose time to get the authority before [199] he answers.

Mr. McHose: We will take just a very few minutes after noon.

The Court: Very well. Come back this afternoon, Admiral Higbee.

(Thereupon, a recess was taken until 2:00 o'clock.)

## Afternoon Session

February 12, 1947

2:00 O'clock

(Same appearances.)

The Court: You may proceed. Have you Exhibit 6?

Mr. Gallagher: No; I haven't got it. Your Honor, yesterday, we were discussing this time charter and I can now state that the vessel was under time charter at the time this accident happened. The charter was amended and the document was actually executed on September 9, 1944, but it went into effect on July 6, 1944, an amended time charter, and the port of delivery was Los Angeles, California. Mr. Newell examined these documents at my office and I think we can stipulate to that without putting in this entire photostatic copy.

Mr. McHose: Mr. Gallagher, I would like to know what your purpose is in putting in this time charter. I see nothing whatsoever to be gained by it and I don't see how it is [200] relevant or competent in this case. I would like to know what your purpose is in putting it in.

Mr. Hon: I don't think it would be proper to put it in at this time.

The Court: Hold that until we get through with this witness and then we will go into that matter.

Mr. Gallagher: All right, your Honor.

Mr. McHose: If the court please, with respect to the matter that was under consideration at the time of the noon adjournment, I have checked the law during the noon recess. I was thinking this morning in terms of practice which we have in admiralty, which is quite common, where a judge wants an expert witness to assist him in connection with the trial of a case, if there are some technical questions involved. I will say even that the court can, in its discretion, permit almost any testimony to be intro-



duced by an expert who is particularly familiar with some subject, such as the deck of a tanker, through long familiarity with tankers; and it is entirely discretionary with the court as to whether the court thinks that the opinion of such an expert or the statement of such an expert as to what might or might not be negligence would be of assistance to the court in deciding the case. In the case of *Eastern Transportation Line vs. Hope*, which is a Supreme Court case, 24 Law Ed. 477, 95 U. S. 297, the rule is stated quite clearly. In that case a towage of some barges [201] was involved and an expert was called who testified as to whether the method of towage was good practice or poor practice. It is the same general subject. It is an opinion given by an expert on whether some particular thing is a dangerous thing or whether the way to do something is one way or another way. The Supreme Court states, very clearly, there, if the court believes such testimony might be helpful, it is proper for the court to admit it. [202]

So I am willing in this matter to leave it entirely to your Honor. I recognize that the question of what is negligence and what is not negligence is ultimately for your decision. If you think it might be helpful to have the opinion of an expert who would testify whether or not it is good practice or bad practice for someone to walk along the deck of an oil tanker in the dark, Admiral Higbee is here and we can ask him the question. If you don't think such testimony is necessary or would be helpful, it is all right with me. I don't want to urge it over the objection.

Mr. Hon: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Hon: Mr. McHose goes into a different field now, asking an expert what the practice is, when he qualifies

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Mr. Hon: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Hon: Mr. McHose goes into a different field now, asking an expert what the practice is, when he qualifies

his question whether or not he thinks something is negligent. I will cite *Thomason vs. Hethcock*, 7 Cal. App. (2d) 634, where it is said that an expert may give his opinion on any particular question involved in a case but that opinion cannot be accepted on the ultimate basic issue, for example, in a personal injury, whether the defendant was negligent. They said that conclusions of this type are for the jury to make. [203]

That wasn't Mr. McHose's question.

The Court: I don't think you need to argue that. I believe you are giving the correct statement of the law. I think, if this witness were asked, for example, a question as to whether or not it is customary for a man, on inspecting the premises, in the Coast Guard, to go through darkened quarters or hulls, that is probably a proper question as to custom, but, when you ask a witness as to what he thinks about it, whether he is an expert or who he is, as to whether or not it constitutes negligence, I think that is not within his province.

Mr. McHose: The Supreme Court case specifically answered the point Mr. Hon made; that, even if the answer is on the point of the ultimate negligence in the case, nevertheless, the expert can be permitted to give that testimony if the court believes it might help the jury or the court in making a decision. But I don't want to press the matter, your Honor. As I said, I think, as a matter of fact, and as I stated in the opening argument, I am going to submit authorities to your Honor which will in my judgment satisfy you there is negligence, as a matter of law, in roaming down a darkened deck at night.

The Court: There is no evidence that he was walking in the dark. He testified that he pulled the flap aside and there was a light illuminated that particular section but he [204] couldn't see ahead. He didn't walk, or he might

not have walked. If there had been a solid footing there for him, I don't know what he would have done. He might not have gone through that corridor. We can't speculate as to that.

Mr. McHose: I would like the opportunity to recall Mr. Richardson if there is any question in the cross examination about that.

The Court: Have I misstated the situation? He testified, as I recollect, that the light did illuminate that opening but beyond that it was dark.

Mr. McHose: That is the important thing, your Honor. He testified—

The Court: He took a step in that direction and he fell down the hold.

Mr. Gallagher: Not while the light was out there. We went over that quite carefully at the time we took the deposition and I think his testimony here was the same. He just pulled the flap back and let it close behind him and then everything was dark after that.

The Court: I don't know what your deposition shows but I think I state what the effect of the testimony was that was given. I think you might ask a question whether or not it was a custom or a duty, or whatever way you want to ask the question, to walk through darkened halls and corridors on board ship on an inspection tour. [205]

Mr. McHose: Would you like to have Admiral Higbee answer that?

The Court: I would like to have an answer to that.

Mr. McHose: Will you take the stand, Admiral?



## ADMIRAL FRANK D. HIGBEE,

the witness on the stand at the time of recess, being previously duly sworn, resumed the stand and testified further as follows:

Mr. McHose: As I understand you, your Honor, the question you would like to have answered is whether it is customary for men making an inspection or whether it is their duty to go onto a dark portion of a ship, which is unlighted, and, for the purpose of this question, Admiral Higbee, I would like to have you assume that the deck where this man went was unlighted and dark; whether it would be necessary and whether it was a part of his duty to go out across the unlighted and darkened part of a ship, such as this.

A. You are asking for the customary practice, is that right?

The Court: Not only the customary practice but whether it was his duty so to do.

Mr. Hon: You have a compound question there.

Q. By Mr. McHose: Perhaps you can cover it in a general way.

A. That is a duty so to do, for an inspector to grope [206] through darkened passageways and to go everywhere throughout the vessel in order to discover jeopardies. His job and one of the impelling duties he has is to ferret out these jeopardies, and only by going into lighted and into darkened places is he going to discover these things. They were trained to do all manner of things to test the efficacy of the guarding efficiency of the ship. They would sometimes board ships over a dark side and come aboard just to test the efficacy of the guards. It was their duty and they had had instructions—I know, when I was captain-of-the-port, that we went almost any and



(Testimony of Admiral Frank D. Higbee)

everywhere and that paid off. It was by doing those things that we discovered these things which could be corrected and which would eliminate jeopardies to the workers and to the ship.

Q. By Mr. McHose: Admiral Higbee, if a person was required, as a matter of his duty, to go into a darkened part of a ship, was he given any instructions as to what kind of caution to use or how he should do that? Did you expect this man to walk out into the dark deck of a ship without being told where he was going?

A. A man who has what we call a ship habit knows that on any ship, and especially on a tank, there are many ring bolts, valves and obstructions on the deck of a ship. A man with a good ship habit and experience, when he comes from light into darkness, will possibly grope his way more carefully. [207] And, while I was captain-of-the-port, that was one of the things that they were given some training in. It takes a long while for a man to acquire that habit and have that ingrained in him so he will take that precaution.

Q. What do you mean by "that precaution"? I want you to assume that the line of duty called a man to go out onto the deck of a tanker. What would he do to take precautions against falling into an opening such as a bunker hatch or to avoid falling over a valve or tripping over a hatch line or any one of the many things that might be on the deck of a ship in a shipyard?

A. The most experienced man as he gropes his way along a ship, when visibility is impaired by partial or total darkness, grasps hold of an end rail or takes hold of something solid and he doesn't let go with one hand until he grasps something else.

(Testimony of Admiral Frank D. Higbee)

Q. He doesn't take a step without knowing what he is going to step into, does he? A. That is right.

Mr. Hon: Just a minute. I am going to have to object to Mr. McHose leading his own witness. That last question is very leading and it is his witness.

Mr. McHose: I forgot, your Honor, that it was my witness. I will reframe the question.

Q. What is the practice or custom as respects the taking [208] of steps when you are walking into a dark space or into a space where you can't see where you are putting your feet, to proceed cautiously, is the briefest way I can explain that?

A. Just as a man comes out of a darkened room or a darkened alley and walks into a lighted boulevard, he may pause a while and get accustomed to it.

Q. When you say that a man should pause, what is the purpose of that pause?

A. It was found definitely during the war that a man who had come out of a lighted room was no good at all as a lookout in darkness for at least 20 minutes. If an officer would leave a watch on the bridge and go into a lighted room and look at a chart, for 20 or 30 minutes after that he couldn't rely on his night vision, and this pause is similar to that. If he comes out of a lighted place, he must pause a while, and I think, if there was a medical officer here, he could explain that better, that there is a dilation of the eye that has to take place there and that pause gives a man time to adjust his vision from a light condition to one of partial or outside darkness.

(Testimony of Admiral Frank D. Higbee)

Q. Is the purpose of that to be able to see where you are going?

A. Yes. There generally always is some vestige of light by which you can grope your way cautiously.

Mr. McHose: I think that is all. [209]

Mr. Gallagher: May I see those pictures, please?

Q. Admiral, I would like to show you Respondents' Exhibit A, which is a photograph 'thwartship, just forward of the bulkhead, where this bunker hatch was located. That 'thwartship space is not a passageway, is it?

A. It wouldn't be commonly referred to as a passageway; no, sir.

Q. In other words, it would be possible for a person to go from the port side of the ship to the starboard side of the ship by climbing over all of these oil lines and valves and hatches and whatnot, but that is not the thing which was furnished for the purpose of going from one side of the ship to the other side of the ship?

A. This is an accessible way to go. If he did not go across there and, in order to go from one side to the other, I think he would have had to have gone—this is aft, isn't it? Q. No; that is forward.

A. He would have had to have gone quite a ways fore and aft along the deck in order to cross over. To answer your question, it is not a passageway but it is an accessible way. A tanker's whole deck is replete with hatches and ullages and pipe.

Q. By Mr. McHose: What is an ullage?

A. It is very much smaller than a cargo hatch. It is a [210] miniature hatch through which soundings are sometimes taken to ascertain the quantity of petroleum cargo in the vessel in that hold. Except along walks and

(Testimony of Admiral Frank D. Higbee)

catwalks such as we see up here, there is almost nowhere on a tank vessel and there are not obstructions.

Q. By Mr. Gallagher: That is why they have the catwalks elevated above the surface of the main deck, isn't it?

A. I will say that it is not. The reason that is up there is because seas break over the deck here and the bridge is forward and the mess room and quarters are aft, and they have to have an elevated position where they won't get struck by the seas lots of times. That is the primary purpose of it.

Mr. Gallagher: That is all.

Mr. McHose: I would like to ask one other question, if I may.

Q. Admiral Higbee, can you state whether it is customary or not customary to have fire extinguishers out on the deck of a tanker?

A. The common practice is to have the fire extinguishers inside shelter.

Q. Have you ever seen any fire extinguishers out on the open deck of a tanker in a place such as along the bulkhead of the after house there, which is shown in this photograph Exhibit A, that being the open deck of the ship? [211]

A. I have seen fire extinguishers out there but seldom. You will see fire extinguishers put out on the deck of a tank ship where small packages of inflamables are being handled. But that is not the place where they are commonly stowed.

Mr. McHose: I think that is all.

(Testimony of Admiral Frank D. Higbee)

Redirect Examination

Q. By Mr. Hon: Admiral Higbee, on the question of going from a lighted place to an unlighted place, a lot depends on how long you have been in the lighted place before you come into the dark, isn't that true? For instance, if you stay in a lighted room an hour and come out to the darkness, your vision is much more affected by the darkness than it would be if you walked right through a room and came out to the darkness in two minutes' time? Isn't that true? A. That is so.

Q. So, if I come from the other side of a door and it is dark in there and I walk through this court room, which is lighted, and go out to the dark, that is, momentarily, it isn't as if I sat in this room an hour or two hours and then go out to the dark, isn't that true?

A. That is the way I have found it.

Q. So, just walking through this room for a distance of 40 or 50 feet or a hundred feet, without stopping, and not reading or doing anything else, would have very little effect on one's vision, isn't that true? [212]

A. It would have less.

Q. Now, Admiral Higbee, it is true, isn't it, that, in leaving a lighted room, you make your pause after you get out into the darkness; that it is not before you get into the darkness? Isn't that true? You would go into the darkness and pause in order to get your eyes accustomed to the darkness?

A. That is the way I have done it.

Q. And that is your understanding of it, isn't it? A. Yes, sir.

Q. Admiral Higbee, is it customary for a tanker, when it is pitch dark or when it is dark, to leave a bunker hatch

(Testimony of Admiral Frank D. Higbee)

completely uncovered, without any guards around it or any light illuminating the hatch, when it is a question of the opening being two or three feet from a passageway out onto the deck, where the hatch is located?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness and invades the province of the court.

The Court: You say "Do you know if it is customary to leave a hatch open under these circumstances"?

Mr. Hon: Under these circumstances, yes.

The Court: You may ask him generally if it is customary but not with reference to any particular facts as in this case; a general question whether it is customary to leave it [213] open or closed.

Mr. Hon: Is it customary to leave these hatches open, unguarded and unlighted, on a ship at night?

Mr. McHose: I think you should add to the question that the ship was in a shipyard.

Mr. Gallagher: And working on a particular hatch.

The Court: I think these suggestions are well taken and you might do so as long as you are going to ask about a custom and surrounding circumstances, as in this case; that you should complete that question.

Mr. Hon: My question, your Honor, would go to the hatches being in such close proximity to open passageways. It might be customary to leave a hatch open at some place where it is not a couple of feet from a passageway, where the custom might be different under the circumstances.

Mr. McHose: You are getting into the matter of argument now.

The Court: Do you assume that all tankers are alike?



(Testimony of Admiral Frank D. Higbee)

Mr. Hon: No; I don't have enough information on that subject to ask it, your Honor. I just don't know, your Honor.

The Court: I am wondering if the witness can answer that question.

A. The question may be answered by reference to the official ship rules and I will answer it also from my own knowledge. [214]

Mr. Gallagher: Just a minute. I object—

The Court: Just a moment. Do you object to that question? Will you repeat the question?

Mr. Hon: Will you read it, Mr. Reporter?

The Court: I think you had better reframe it because everybody tried to help you out there.

Q. By Mr. Hon: You have seen that center blueprint there, haven't you? A. Yes, sir.

Q. And you understand that is a bunker?

A. Yes.

Mr. Hon: What were the dimensions of that?

Mr. Gallagher: 4 by 6.

Mr. McHose: 4 x 6.

Q. By Mr. Hon: Is it customary, Admiral Higbee—

Mr. McHose: May I interrupt you to make sure that the Admiral understands that that is a bunker hatch leading to the port bunker? A. Yes, sir.

Q. By Mr. Hon: Is it customary, Admiral Higbee, to leave a bunker hatch, of the approximate dimensions of 4 feet by 6 feet at the top opening, and 36 feet 7 inches deep—is it customary, at night time, to leave such a bunker hatch opened and uncovered, without guards or railings, or without any illumination at all in the darkness, when it is within two [215] or three feet of an open passageway on a ship?

(Testimony of Admiral Frank D. Higbee)

Mr. Gallagher: Your Honor, that is objected to on the ground it calls for a conclusion or opinion and invades the province of the court and is not relevant to anything here in controversy. This ship was in a shipyard undergoing repairs. I think your Honor should tell counsel to include those elements in there and that they were working on that particular hatch.

The Court: You may add that to the question and the question may then be answered.

Mr. Hon: I will add this to the question—your Honor, I don't know; I thought I had the question the way your Honor wanted it. I will add to that that the tanker was docked for repairs. And assume there had been no repair crew working on that ship for a period of 29 or 30 hours. Would it be customary to leave such a bunker hatch uncovered, unlighted and unguarded, for a period of 29 to 30 hours, and at a time when it was dark and the floor was shadowed?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion and is incompetent, irrelevant and immaterial.

Mr. Hon: I will say this, your Honor. I think it is. I say that it is something for this court to determine. I am willing to withdraw the question completely and let your Honor determine that. [216]

The Court: I think that is not a matter of custom but it is a matter of regulation. There are some regulations governing that particular situation.

Mr. Hon: If there are regulations covering it, that takes care of it.

Q. Are there regulations covering that setup of hatches?

(Testimony of Admiral Frank D. Higbee)

Mr. Gallagher: Wouldn't the regulations be the best evidence of that? Mr. Hon: Yes.

The Court: You haven't that regulation here, that federal regulation, have you?

Mr. Hon: Is that contained in this?

The Court: Look at it and see.

Mr. McHose: I think we are getting into the same field we got into this morning but, if your Honor thinks it is helpful, I have no objection.

The Court: It is a field that has not been explored, apparently. He may answer the question the way it was asked, adding the other portions that you added to that question.

A. Tank ships and hatches are required by the established practices of prudent operation of a tank ship and by some regulations on the subject to be screened when opened. One primary purpose is when they are handling cargo.

Mr. Hon: But the fact that the ship is in a shipyard undergoing [217] repairs is not excluded?

A. The regulations do not so except when you have a tanker in a shipyard undergoing repairs. They do not waive that requirement.

Mr. Gallagher: I move to strike out the answer upon the ground that it states conclusions and opinions of the witness and is not competent evidence of any fact.

The Court: If that regulation is a fact, I think the answer is proper.

Mr. McHose: I would like to ask the witness a few questions about the regulations and show him the regulations and ask him to show us the regulation in the book that states that, and I don't think he will find such a regulation. The regulation you refer to I think refers to ullages and cargo hatches.

(Testimony of Admiral Frank D. Higbee)

The Court: I think I will sustain that motion.

Mr. Gallagher: Will your Honor entertain a motion to strike? The Court: The answer may be stricken.

Q. By Mr. Hon: Now, Admiral, I believe you testified you promulgated the rules as contained in these regulations for tank vessels. May I ask you, sir, whether or not they were promulgated with the sole intention of protecting property or were they also promulgated to protect risk to human life? [218]

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion or opinion of the witness.

The Court: Sustained.

A. Your Honor, may I clear up a point that seems not to be clear? There is an implication that I promulgated those regulations. Those regulations, as you will find in the back of the book, were promulgated by Rear-Admiral R. S. Holmes, the Commandant of the Eleventh Naval District, adding a little bit more than they had had for peace-time operation, in order to provide for the jeopardies of the war situation. They are not rules that I wrote. It is just a compilation of matter which we got from the National Petroleum Security Council and from the other operators and put together and, after they were approved by the military and the naval authorities, they were promulgated by the Commandant of the Naval District; not by me.

Mr. Gallagher: I move to strike out the statement of the witness on the ground it is a voluntary statement and is not competent evidence of any fact.

The Court: It may stand, that is, the remarks may stand. Do these rules contain all of the regulations regulating the conduct or maintenance of a vessel of this kind?

(Testimony of Admiral Frank D. Higbee)

A. Not maintenance, your Honor. These rules are brief rules which govern the conduct of a ship from the time it enters the naval defensive sea area until it departs. It doesn't [219] have all of the rules you will find for the old, big tank ships, which go into strength of materials and machinery equipment and electrical devices. These are rules which are almost entirely for the safeguarding of operations.

The Court: I have particular reference to that. In so far as inspection and safety of a vessel are concerned, do these rules contain all of the rules and regulations in that respect?

A. Not all of those as, for example, they don't go into boiler pressures and things like that. It is mainly guarding and unloading cargoes. There is quite a good index in the thing. Without the book, I am somewhat at a loss.

Q. What other book is there in existence that contains these rules? I mean other accepted rules?

A. There is the National Steamboat Inspection Rules, more popularly called the Rules of the Bureau of Marine Inspectors.

Q. Would those rules also disclose laws or rules regulating the operations in the handling of vessels of this kind, in the particulars with which we are concerned at the moment?

A. Those rules were almost void of any regulation as to requirements for guards. When the National Tank Ship Rules were written, those things were left to private operators, and we would have left it to the private operators out here, too. But the Secretary of the Navy came out here and made a survey [220] of this port and it was established on account of the hazards of the Long Beach-Los Angeles Harbor being much more than the ordinary

(Testimony of Admiral Frank D. Higbee)

port, on account of the congestion and because it was so much of an oil port. And, by his order, he required that we supplement the National Rules with some of our local. So we did not write all of those other rules. We just wrote this little book after consultation with the oil people, which supplemented the larger book, which went into everything.

The Court: Any further questions?

Mr. McHose: I should like to clear up something, your Honor, that may come up in connection with argument in reference to those rules.

#### Recross Examination

Q. My Mr. McHose: In Rule 20, Admiral Higbee, if you will look at it there, it refers to the screening of openings of ullage holes and cargo hatches, and I would like to make sure that this bunker hatch is not an ullage hole.

A. No; it is not; no, sir.

Q. An ullage is not a cargo hatch, is it?

A. It can be used as a cargo hatch when they put package goods down that, and it so becomes a cargo hatch when they put—

Q. If it was used for cargo, then it could be a cargo hatch? [221)

A. Yes.

Q. But, when it is used for bunkers, it is a bunker hatch? [221]

A. Yes.

Q. I would like to have you tell the court what the screen is that you refer to here. Is not that a screen designed primarily for fire protection, to prevent sparks flying into the compartments?

A. It is primarily for fire protection. It is made with two cross bars of metal rods for a small ullage, and the



(Testimony of Admiral Frank D. Higbee)

screens in the rectangular cargo hatches are almost identical with house screens that you would see to keep out flies.

Q. Those screens are not designed to prevent people or large objects falling into hatches, are they?

Mr. Hon: Just a minute—

A. They would support them, as I understand it—

Mr. Hon: Just a minute.

Mr. McHose: I will withdraw the question. I have no further questions.

The Court: Are there any further questions?

Mr. Hon. That is all.

Mr. Gallagher: No questions.

Mr. Hon: May this witness be excused?

The Court: Yes. [222]

Mr. Hon: Your Honor, at this time I would like to read certain—

Mr. McHose: Mr. Hon, I wonder if you would mind if we would put something in at this time out of order.

Mr. Hon: Not at all.

Mr. McHose: I was going to ask you if you would have any objection if Dr. Stephens and I looked quickly at Mr. Richardson's leg.

Mr. Hon: Oh, no; not at all.

Mr. McHose: I was going to suggest we might have a recess now, if that is satisfactory, and he can do it during that time and he could also look at the X-rays that were introduced yesterday.

The Court: Very well. We will take a recess.

(Short recess.)

Mr. McHose: May we put on Dr. Stephens, your Honor, out of order?

The Court: You may.

JOHN S. STEPHENS,

a witness for the respondents, being first duly sworn,  
testified as follows:

The Clerk: What is your name?

A. John S. Stephens.

Direct Examination

Q. By Mr. McHose: Dr. Stephens, are you a doctor  
of [223] medicine?      A. I am.

Q. Where did you do your training?

A. I graduated from Stanford University, Medical,  
in 1929. After finishing my internship, I took a year  
residency at the Los Angeles General Hospital, in the  
orthopedic service. Since then I have been on the or-  
thopedic staff of the Los Angeles Hospital, the Torrance  
Hospital and the Good Samaritan Hospital.

Q. Have you specialized in some particular field of  
medicine, Dr. Stephens?

A. I have specialized in orthopedic and traumatic sur-  
gery.

Q. Are you admitted to practice medicine in the State  
of California?      A. I am.

Q. Dr. Stephens, at my request, did you make an ex-  
amination of Mr. Richardson, the young man who is sit-  
ting in the court room here today, some time ago?

A. Yes; I did. I made two examinations.

Q. When did you make the first examination?

Mr. Hon: May I inquire just a minute before you  
proceed? Is this the testimony of both respondents, Mr.  
McHose, or just one respondent? I would like the record  
to show.

Mr. Gallagher: We will join in the calling of the  
witness. [224]

(Testimony of John S. Stephens)

Mr. Hon: Thank you.

A. I examined the patient first on August 27, 1945.

Q. By Mr. McHose: Where?

A. In my office.

Q. And what kind of an examination did you make. Doctor?

A. I gave him a rather complete examination.

Q. What do you mean by "a complete examination"? Tell us just what you did.

A. I examined him for his general skeletal condition and examined the movements of his extremities. I examined him for muscle strength, what we speak of as an orthopedic type of examination.

Q. Did you have X-rays made? A. I did; yes.

Q. Do you have those X-rays with you here in court?

A. I have.

Q. Did you obtain a history from the patient?

A. I did.

Q. Did that history contain a statement of an injury that he had received by a fall? A. Yes.

Q. And did you particularly examine him with reference to that particular injury? A. I did. [225]

Q. What did your examination show, Doctor?

A. Well, the examination at that time showed positive findings. They revealed a little restriction of knee motion, a little restriction of hip motion, and there was a little internal rotation of the right leg. The foot turned in a little bit. In other words, he was a little pigeon toed on that side.

(Testimony of John S. Stephens)

Q. Did your examination reveal that he had had a break of the right femur?

A. Yes, which at the time was healing and in good alignment.

Q. Were you able to tell what kind of medical treatment he had received for that fracture?

A. Well, I could tell from the X-rays that he had had bone reduction and a plate had been applied and then he had been placed in a cast following that, until the femur had united.

Q. What did you find with respect to the uniting of that femur?

A. At that time union was progressing very satisfactorily and he was bearing weight.

Q. Was he using at that time any crutches?

A. I don't think he was.

Q. What other things did you find in your examination?

A. I examined his back and know the back was straight. [226] He complained of tenderness over the fifth lumbar lamina. Forward bending permitted the fingertips to reach six inches from the floor. The lateral and backward bending was unrestricted. In other words, he had an essentially normal appearing back.

Q. Did you take any X-rays of the back?

A. We did; yes.

Q. Were there any positive findings?

A. There were none.

Q. Did the X-rays show a normal back condition?

A. Negative; yes.

(Testimony of John S. Stephens)

Q. Did you observe a scar where the operation had been performed in connection with the broken femur?

A. Yes; there was a well-healed scar on the outer side of the right femur.

Q. Did you find any objective findings at that time in respect to injuries resulting from the broken leg?

A. Only as I said before; he had some little internal rotation of the foot. He walked toed in on that side, and, of course, he had the scar; that was all. And he still had a little restriction of flexion of the hip and the knee. He hadn't regained that at that time.

Q. Can you state whether he had made normal post-operative recovery from this operation?

A. At that time I felt that he had made a good re- [227] covery.

Q. Did you at that time find any evidence there was permanent-partial disability as a result of this accident?

A. I felt at the time he would make a complete recovery with the possible exception of four or five degrees of rotation of the femur.

Q. Doctor, would that condition have any effect on his ability to work, let us say, as a machinist?

A. I don't believe that it would.

Q. Did you find anything further at that time, Doctor, that I have not covered in my questions?

A. Well, he at that time was also complaining some of his ankle, or his left heel, it was.

Q. Did you make an examination of that?

A. I had X-rays taken of that and couldn't find anything in the X-ray or in the examination of significance.

(Testimony of John S. Stephens)

Q. When did you examine him again?

A. I re-examined him on October 10, 1946, again in my office.

Q. And what kind of an examination did you make at that time?

A. I gave him the same type of an examination.

Q. And what did you find at that time with respect to the broken femur?

A. Well, I found no changes. It apparently had con- [228] tinued to heal in the manner in which it was healing at the time that I saw it. He was not complaining at the time of the femur.

Q. What did he complain of at that time?

A. At that time he was complaining primarily of swelling in his right leg. He stated that his "right leg swells up a lot when I walk around concrete. It aches through both hips and the back. The right leg swells up at night and it is down in the morning. I had a little patch of rash on the inner side of my right leg. It is now getting larger and itches a lot."

Q. Did you make an examination of the leg, Doctor?

A. I examined him in the same manner I had examined him before.

Q. Did you find some condition in the right leg you had not found before?

A. At the second examination I found that he had rather well-developed varicose veins on the right leg and, to a lesser degree, on the left leg. He had a patch of eczema, which is a scaling skin rash, over the lower part of the right leg, above the ankle, and he had definite evidence of incompetent veins in his leg. He had regained practically all of the motion of the hip and the



(Testimony of John S. Stephens)

knee, and an examination of his back revealed tenderness in a little different area than he had previously complained of. It was very slight and [229] it was up more in the region of the ribs on the left side. At that time he had full back motion and was able to bend forward and touch the floor with his fingertips.

Q. Doctor, did you find anything in either of your examinations that caused you to form an opinion as to whether Mr. Richardson has any permanent disability, confining it to the broken femur, the injury that he received?

A. Well, in a small sense, he has a permanent disability as a result of the fracture in that he does apparently have about five degrees internal rotation of the lower part of the leg. In other words, when the plate was applied to the femur, instead of getting the ends of the bone in perfect alignment, apparently they permitted, or over-corrected, let me say, the lower part of the leg, so that, instead of being in perfect alignment, there was a little rotation.

Q. Would that condition, Doctor, in your opinion, have any effect upon Mr. Richardson's ability to do work, let us say, as a machinist or on a farm?

A. I don't think it should; no.

Q. Dr. Stephens, do you have an opinion as to whether the fact that this plate is in his leg makes any difference so far as his general condition is concerned?

A. I don't think it does at all.

Q. Is it necessary or advisable, in your opinion, to remove that plate from the leg? [230] A. No.

(Testimony of John S. Stephens)

Q. Will the presence of that plate in his leg affect his ability to work as a machinist or on a farm?

A. It shouldn't.

Q. Doctor, did you form any opinion as to the cause or the reason for the eczema condition on his leg?

A. Well, I feel that the eczema is a varicose eczema.

Q. What do you mean by that?

A. Well, it is an eczema that develops as a result of the impaired circulation to the skin, as the result of the varicose veins, which does not permit the blood in the veins to return to the heart in the normal manner. In other words, in a varicose vein, the blood runs in the wrong direction and the blood, for that reason, is not replenished with oxygen as it normally should be.

Q. Is there any medical treatment that could be given to correct that condition?

A. Well, the treatment for the condition is self-supporting bandages to keep that stagnant blood out of the extremity. The other method is to tie the veins and inject them. The most satisfactory method is the removal of the veins, simply take them out.

Q. Do you have any recommendation as to what ought to be done in Mr. Richardson's case?

A. I think in his case he should have the veins removed. [231] He should at least wear supporting bandages at all times.

Q. Do you believe, if this operation on the veins were conducted, that the eczema condition would be corrected?

A. The eczema would be considerably improved. He would have some permanent pigmentation there. I mean there would always be brown spots on his leg. The eczema will get better.

(Testimony of John S. Stephens)

Q. Would you recommend that operation be done?

A. I think it should be; yes.

Q. Can you state what is involved in that operation in the way of time, medical and hospital expense?

A. The operative procedure consists of opening up into the groin where the veins start, and tying them in that region, and then removing them through successive small incisions. It requires about four or five small incisions down the leg. The veins are then passed down and stripped out in three or four segments.

Q. Is that a very complicated or long operation?

A. The operation, for two men, I suppose should require an hour and a half.

Q. About what would it cost, Doctor?

A. Oh, I think three or four hundred dollars would be a good fee for it.

Q. Do you mean for the doctor's fee and the hospital cost?

A. I don't know. He would have to be in the hospital [232] two or three days.

Q. How long would it be before he could walk after the operation?

A. He could walk immediately after the operation. That is a part of the operation, to keep them on their feet.

Q. Is that a very serious operation, Doctor.

A. No.

Q. Do you have an opinion, Doctor, as to whether the condition of eczema or the condition of varicose veins

(Testimony of John S. Stephens)

which, as I understand you, cause the eczema, has any causal relation to the injury to the femur?

A. I don't think so. Varicose veins are very common. They can appear in the second and third decades of life. They usually do. Trauma or an injury is not considered as a factor. It is usually a hereditary thing or some intrinsic weakness in the muscles or the veins. We don't know what it is.

Q. Do you believe that, if Mr. Richardson had the operation, of which you spoke, for the removal of the varicose veins, the condition of his right leg would be materially improved?

A. I think it would; yes. He would have less swelling of the leg and his eczema would disappear.

Q. Doctor, did you, at my request, look at the X-rays which were introduced in evidence here yesterday as Libellant's Exhibits 4 and 3? [233]

A. I did.

Q. Do those X-rays reveal substantially the same thing as are shown in your own X-rays?

A. Those are essentially the same pictures that I have for 1945, except that in these films the healing is now complete.

Q. In your films the healing is complete?

A. No; in these more recent films. You see, mine were taken two years ago and those films haven't yet shown a complete, solid union.

Q. Do these films show a complete, solid union?

A. Those do; yes, sir.

Q. Doctor, some testimony was given yesterday with respect to what the Doctor called an osteoma.

A. It is really a spur on the bone.

(Testimony of John S. Stephens)

Q. Do you have an opinion as to whether that bears any causal connection to the break in the leg?

A. An osteoma or an excess osteosis to the fracture, is one which one usually sees it in a fracture in the region of the femur, and is of no significance at all.

Q. Would it affect the person, who had such a thing, in any way whatsoever?

A. No; it couldn't possibly.

Mr. McHose: That is all. [234]

#### Cross Examination

Q. By Mr. Hon: Doctor, then, it is your professional opinion that the osteoma which you see in this X-ray that has just been shown to you was the result of an injury, is that true, sir?

A. It was the result of the injury; yes.

Q. Doctor, you examined Mr. Richardson about 20 minutes ago back in the anteroom, did you not?

A. Yes.

Q. What part of his anatomy did you examine?

A. I examined primarily his lower extremity.

Q. As a matter of fact, in examining his lower extremity this afternoon, you found that his condition was worse today than it was the last time you saw it, didn't you? A. In reference to his eczema; yes.

Q. Wasn't his entire condition worse, his leg?

A. His veins were, I believe, more prominent; yes.

Q. And, also, weren't the other conditions worse than when you last saw them? All of the other conditions you examined, the last time you saw him, were worse?

A. As I say, I only examined the lower extremity. I asked him to bend forward and he came to within about two inches of the floor with his fingers.

(Testimony of John S. Stephens)

Q. Doctor, where are the X-rays that you took of Mr. Richardson? [235]

A. I didn't take those. Those were taken at the Good Samaritan Hospital by Dr. Raymond Taylor.

Mr. McHose: We will let those go in.

Q. By Mr. Hon: Can you state from those X-rays what type of fracture he had to the femur, whether it was compound, simple or what?

A. You can't tell whether it was compounded. There may have been some degree of comminution. You rarely see a true simple fracture in that you have one fracture line. Sometimes there are little pieces of bone knocked off. A comminuted fracture is a fracture in which there are many fragments, characteristically as in a gunshot wound, where it shows the bone. That is essentially a simple fracture.

Q. Was it a complete break?

A. Oh, yes; it broke. There is no question about that.

Q. The purpose of putting that plate in was to hold it together again so it would grow back together, is that right?

A. That is the purpose; yes. It simplifies the treatment of a fracture of the femur to be able to put in a plate in there, although actually it doesn't always do it. It is, however, good treatment. There is no question about it. He has had good treatment.

Q. Dr. Stephens, varicose veins are, I believe you said, caused through bad circulation, is that true?

A. No; varicose veins are not. Varicose veins [236] are caused by the dilatation of the superficial veins in the lower extremities. There are two sets of veins. There are the deep veins which are surrounded by muscle and



(Testimony of John S. Stephens)

are supported by the muscles of the leg, and those veins depend to a great degree on the support of the muscles and the muscle action and the valves within them to return the blood to the heart. The superficial veins are these veins that become varicose veins.

Q. The superficial veins do not have the support of muscles?

A. They simply lie in the area under the skin and, if for any reason those veins become dilated or stretched a little bit or weakened and the valves within the veins fail to support this column of blood, then the veins begin to enlarge and, as they enlarge, then the valves within them no longer function and then it is essentially like you hang up a rubber container full of water. Eventually, if you hang it up long enough, it will continue to stretch and get larger, and that is essentially the picture of varicose veins.

Q. How long do you think he has been suffering from varicose veins?

A. Apparently, from my examination, about a year or a year and a half.

Q. Doctor, assume that this young man was in a Spica cast from his waist right down to his toes, a rigid cast, four [237] or five in all, over a period of nine months, what effect, if any, would that have upon that leg with respect to his veins?

A. It shouldn't have any effect. It shouldn't have any at all; no.

Q. That cast fits up tight against the leg, doesn't it?

A. Not necessarily; no, sir. I don't know what kind of a cast was put on.

Q. And what effect would it have on that condition you described as eczema?

A. I don't think he had eczema at that time.

(Testimony of John S. Stephens)

Q. Do you think the cast had anything to do with bringing on the eczema?                      A. No; I don't.

Q. Doctor, if he had been suffering from varicose veins say a year to a year and a half, which would have predated your first examination, is it your professional opinion that those casts, or being in that rigid cast, for a period of nine months, connotes in any manner, shape or form or would affect the condition of varicose veins?

A. No; it would not.

Q. Would it affect circulation any at all?

A. Probably only to improve it.

Q. To improve the circulation?

A. It might interest you to know that the treatment of varicose veins is the application of a very snug-fitting support [238] or a boot, a flexible type of cast. The legs do very nicely as long as they have a good tight support on them.

Q. How long is that support to be left on?

A. Of course, that is in the treatment of that.

Q. That is a temporary proposition for a few days, isn't it?

A. No. Some people wear supports for months and some of them years.

Q. Without taking them off?

A. You take them off every three or four weeks or a month maybe.

Q. Then, it is your testimony that, if he was suffering from varicose veins before this accident, and then the fact that he was for nine months in these casts, completely encasing his right leg, it would not have effect at

(Testimony of John S. Stephens)

all either on the eczema condition or the leg condition, is that right?

A. Of course, he didn't have the eczema condition. He has only had that recently. And, as I understand it, he didn't have any eczema on his leg, not when I saw him in 1945, and at that time he was out of the cast. I don't see how it could have entered the picture at all. I mean I can't answer that question.

Q. May I ask you, Doctor, the word "trauma" means injury, doesn't it? A. Yes. [239]

Q. And it is so applied to injuries received by some accidental means? A. Yes, sir.

Q. Are varicose veins ever caused by a disturbance to the veins or are varicose veins produced by a trauma?

A. Not the veins; no.

Q. Is it your testimony that trauma is never a contributing cause even to varicose veins?

A. A trauma can be a contributing cause in one sense.

Q. What is that sense?

A. And that is, if, for any reason, a trauma would cause an occlusion of veins, and in that manner set up an infection and close the deep veins, then that might then require the blood to circulate through the other veins and produce varicosities.

Q. Doctor, did you find any angulation in the right femur at the fracture site?

A. There is an angulation of a degree or two. It is hard to tell without taking a picture of the other femur how much there was. There sometimes is a normal bowing of a femur, you know. I think there is probably a degree or two; yes, sir.

(Testimony of John S. Stephens)

Q. And isn't it true that the angulation of the femur causes the knee to bend in somewhat?

A. I don't think—no; not the angulation of the femur, [240] As I said, there is about four or five degrees of rotation. Angulation is this and rotation is this. I don't think the rotation is important.

Q. What part does the angulation have upon the knee with regard to the motivity?

A. None unless it is quite marked.

Q. Doctor, you state that the right foot is turned inward?

A. I said about four or five degrees; yes, sir.

Q. That makes it what you would call pigeon toed, is that right?

A. Yes; he walks pigeon toed.

Q. Doctor, what effect does that have upon his walking?

A. He walks pigeon toed. That is the story.

Q. If he walks pigeon toed, that is the normal gait for a man, isn't it?

A. Not all men. It is abnormal in his case.

Q. And he will walk pigeon toed in that respect all the rest of his life, in your opinion, won't he?

A. I think to a degree; yes.

Q. And, Doctor, it is true that that pigeon toed condition materially affects his walking, isn't that true?

A. Oh, I don't think it slows him down at all.

Q. Would you say it would tend to tire the man more so than if he had a normal gait? [241]

A. No; not unless he did a great deal of walking.

Q. Doctor, scoliosis can be caused by a trauma, can't it?

A. No.

(Testimony of John S. Stephens)

Q. You have never heard of it?

A. No, with one exception. I am referring to true scoliosis, which is a deformity of the spine. A true scoliosis is not caused by trauma.

Q. There are some conditions that we see in a very painful sprained back, when a person has muscle spasm on one side of his back and pulls away over to the side that caused the scoliosis?

A. No. That condition we sometimes refer to as an acute scoliosis but it is something that runs only a day, a day or two. There is no traumatic scoliosis that I know of.

Q. They call that a scoliosis for this reason—isn't it a fact that a scoliosis is an abnormal curvature of the spine laterally or sideways? A. Yes.

Q. In other words, if I walk like this, bent over to my right, for four or five blocks, that is going to temporarily cause an abnormal lateral curvative of the back, isn't that right?

A. But it will clear up. If you walk over to the side, by virtue of the fact you are walking over to the side, you are producing a curvature, but that is not a scoliosis. [242]

Q. But you often refer to it as an acute *scoliosis*, don't you?

A. I have very rarely heard the term.

Q. But it is often referred to as an acute scoliosis, isn't it? A. Not often; no.

Q. But it is, isn't it? A. Not in my opinion.

Q. Then, what did you mean by saying it would cause an acute scoliosis?

A. Only if, for instance, I stood up and I were to sprain my back, let us say and, as a result of this sprain,

(Testimony of John S. Stephens)

I would hold myself in a position, bending to the right or to the left, to protect that injured portion of my back for a few days. I think, then, you might call that an acute scoliosis.

Q. Doctor, assume that David Richardson, the man you examined first in August, 1945,—assume that one year prior to that date, or August 6, 1944, in walking, he stepped into an open passageway and fell straight down for a distance of 36 feet and 7 inches and landed on his feet and in a sitting position, in your professional opinion what, if any, effect would that have upon his spine or his back?

A. Well, it might hurt it or might not.

Q. Your professional opinion is that it would hurt it, isn't that true, sir? [243]

A. He could hurt it.

Q. Your best opinion is that it would hurt it?

A. Oh, no; not necessarily. By falling 36 feet, 7 inches, it would depend entirely on how he fell. I should say in this particular case he must have lit probably on his heel of the right leg or he wouldn't have probably broken his leg and that, in itself, probably broke his fall considerably.

Q. But Doctor, assuming that he didn't break his leg until he hit the hard surface at the bottom of the 36 feet, 7 inches.

A. I simply can't become too involved in this form of discussion because I don't know how he fell.

Q. I am giving you what the testimony shows. Assume that he did fall straight down for 36 feet and 7 inches and landed on his feet in a sitting position and with sufficient force to break his right femur completely in



(Testimony of John S. Stephens)

two. Is it your testimony, Doctor, that, in your professional opinion, that wouldn't cause any pain, injury or damage to the small of the back?

A. That would depend entirely on how he fell. You see, he lit on his feet in a sitting position. That I can't answer.

Q. That would, in your professional—

A. He could sustain a very severe back injury or none at all. [244]

Q. And he could sustain a severe enough back injury that it would produce this so-called acute scoliosis, isn't that right?

A. Oh, he could have; yes. He could have had an acutely sprained back from it, which would have been painful for days.

Q. You say he had a restricted motion in the knee. I assume you mean a restricted motion in the right knee?

A. Yes.

Q. How much restriction was there?

A. I think it was five degrees the last time.

Q. That was the last examination? A. Yes.

Q. In what direction was the restriction?

A. In the bending.

Q. In the bending? A. Yes, sir.

Q. That is, bending the leg backwards?

A. Yes, sir.

Q. Doctor, what effect, if any, does that restricted motion have upon his walking or his gait?

A. It would have none on his walking or his gait.

Q. But it would materially affect his knee in causing it to tire easier than a normal knee, wouldn't it?

A. No. The only way that could cause him trouble would be, if he assumed a full squatting position, he prob-

(Testimony of John S. Stephens)

able wouldn't [245] squat quite as far with one buttocks as he would with the other.

Q. Doctor, assuming a full squatting position with that limitation of motion, isn't it true that would cause pain in that right knee? A. Not necessarily; no.

Q. Doctor, you made a statement a while ago that the condition you found yourself wouldn't be sufficient to prevent him from doing the work of a machinist. When you made that statement, what was your opinion as to what a machinist did?

A. Well, I am reasonably familiar with the work of a machinist.

Q. All right. Just tell us.

A. Well, they do considerable stooping and squatting and bending. They use wrenches. They use sometimes heavy wrenches. They do a lot of bending work. They do some lifting, although some of the very heavy lifting with the machinists I know of is done with a winch.

Q. Assume, Doctor, that Mr. Richardson was a machinist helper prior to entering the service of the United States Government; in other words, that was his last occupation before going into the Coast Guard, and assume that in that work he was often required to be on his back, to climb ladders, to bend, stooping, and lifting articles weighing as much as a hundred and two hundred pounds; is it your testimony, Doctor, [246] he could work a straight 40-hour week at that trade, that is, Doctor, without discomfort?

A. Oh, he may have some discomfort for a while, until he got used to it, but I think he could do the job.

Q. And do you think the discomfort would be very slight, is that right?

A. He may have some discomfort; yes.

(Testimony of John S. Stephens)

Q. What discomfort would he have?

A. Until he got used to this particular type of work, he would have possibly some in his knee, if he forced it beyond that degree of flexion that we referred to, until he regained full flexion. I think, in a very short time, he would get the full flexion of his knee if he used it a little more. He might have some discomfort on heavy lifting, real heavy lifting.

Q. Doctor, in examining a patient, you have two kinds of symptoms, do you not, the objective and subjective symptoms?

A. Yes, sir.

Q. And isn't it true your objective symptoms are, like your X-rays, something you can see by the eye or feel or observe?

A. Yes, sir.

Q. And the other symptom is a subjective symptom?

A. Yes, sir. [247]

Q. And that is something you take a patient's word for?

A. That is what the patient tells you; yes, sir.

Q. And it is true that pain is a subjective symptom, isn't it?

A. Yes, sir.

Q. And this young man having fallen in the manner that I have heretofore described to you, for a distance of 36 feet and 7 inches, you could not state that he was not suffering from severe pain in his back at this time, could you, as a positive fact?

A. From my examination, I didn't feel he was having severe pain in his back. If a patient is suffering from severe pain in the back, they usually have some objective symptoms in their picture which show they have muscle spasm; they are not able to stand up straight or they are not able to bend forward. And the straight leg raising

(Testimony of John S. Stephens)

is usually positive. In other words, they can't lift their heel up off the bed more than 20 or 30 degrees without severe pain in the back, and he didn't have either of those three at the time I examined him.

Q. Doctor, do you discount in your testimony the fact that he fell 36 feet 7 inches and landed in a sitting position with sufficient force to break that femur in half? Do you discount that in your testimony as having no value in the case at all or no bearing? [248]

Mr. Gallagher: That is objected to, your Honor, upon the ground that it is ambiguous and argumentative and unintelligible.

The Court: Overruled.

Q. By Mr. Hon: Answer the question, Doctor.

A. Repeat it, will you, please?

(Question read by reporter.)

A. I think, in a sense, you can discount it because he broke the femur, which means, in my opinion, that a great deal of force was transmitted to the femur when he fell, or he wouldn't have broken it. And, again, I say the height of the fall isn't of great significance in back injuries, and you either hurt them or you don't hurt them. And we very frequently see patients who have fallen from great heights and broken both arms and legs and no complaint of back injuries.

Q. And you frequently see patients where that is the only complaint they have, don't you?

A. Yes, indeed. But that, again, depends on how they fall. It is not the height.

Q. Doctor, how does a man have to fall 36 feet and 7 inches sufficient to cause severe pain in his back, then?

A. He doesn't have to fall only a few feet or he can fall a hundred feet and not hurt his back.

(Testimony of John S. Stephens)

I agree with you in this sense, that, if he falls [249] 36 feet, he can hurt his back, in fact he can kill himself very easily; but, on the other hand, he doesn't have to hurt his back.

Q. The point I am trying to get over is merely this, that falling that distance and landing in that position is sufficient to cause great pain in the back, isn't that true?

A. It depends on whether he did injure it or not.

Q. Now, Doctor, you stated that you found a restriction in the hip joint. A. Yes, sir.

Q. How much restriction was that?

A. It was about 10 degrees.

Q. 10 degrees' restriction in the hip joint? That is the right hip joint? A. Yes, sir.

Q. And that is on forward and backward motion but, on the other hand, —

A. No; that is bending it in this position.

Q. Raising the knee?

A. Raising the hip up like this. One knee will come up until he can almost get it to his chest and the other fails just by about 10 degrees.

Q. Doctor, what effect, if any, does the 10 degrees' limitation of motion in the right hip have upon his walking?

A. Nothing excepting in the full squatting position. [250]

Q. Doctor, would that be sufficient to cause pain in a full squatting position?

A. For a time; yes, until he regained his full degree of motion.

Q. Doctor, the combination of 10 degrees' limitation of motion in the hip and 5 degrees' limitation of motion

(Testimony of John S. Stephens)

in the knee, on the same side, and 5 degrees' rotation of the right foot inwardly, causing a pigeon toed effect,—wouldn't that combination of the three materially affect his walking?

A. I don't think the flexion of the knee or the limitation of full flexion of the knee, which is essentially this, and the full flexion of the hip, which is essentially this, a few degrees lost of those two movements—it is not going to affect his walking.

Q. Doctor, wouldn't the combination of those three things mostly affect his ability to work as a machinist, in doing the things I enumerated a while ago?

A. As I said before, the limitation of the hip flexion, and of the slight limitation of the knee flexion, might for a period of say weeks.

Q. It would make it a little more difficult for him to get into the full squatting position until he overcame that?

A. That might be days or weeks but that is the only way that it could.

Q. Doctor, is it your professional opinion that this [251] man today is not suffering from any pain whatever?

A. Oh, I can't say that he is not having some pain in his back.

Q. Your professional opinion, Doctor, is that he is having pain in that back, isn't that right?

A. I will have to take his word for it; yes, sir.

Q. And it is reasonable to your professional mind that he is having that pain, isn't it?

A. He can have some pain although I am not of the opinion it is very severe pain, according to my examination.



(Testimony of John S. Stephens)

Q. But you do, in your professional opinion, think he is suffering from a pain in the back today?

A. He says he is and he may be.

Q. In your professional opinion, Doctor, do you think that he tires easily on walking?

A. Oh, I don't think that this rotation of his foot would very materially affect his walking. It might affect his running or, if he were in athletics or trying to run over hurdles; it might handicap him. But I think for the usual daily ratio that he will come along pretty well, about as well as anyone else.

Q. In other words, you think, though he has a 10-degree limitation of motion in the right hip and a 5-degree limitation of motion of the right knee and a 5-degree limitation of motion of the right foot, that he is just as well off as before [252] the accident, is that right?

A. Oh, no; I didn't say that.

Q. All right. Tell us, then, how he is worse off than before the accident.

A. Well, he toes in, that is about all, and he can't squat. He probably couldn't get into the full squatting position, but one rarely gets in that position. It certainly isn't very important in your routine living.

Q. He will go through life, will he not, in your professional opinion, with some permanent disability?

A. Yes; he will toe in and in that sense he has some permanent disability.

Q. And you cannot state how long he will suffer pain in that back, can you?

A. No; but I am of the opinion that it won't last very long.

(Testimony of John S. Stephens)

Q. But that is strictly problematical, isn't it, Doctor?

A. Yes; but, without X-ray and other evidence of technical disability, I don't feel that this back condition will continue for any great length of time.

Q. Doctor, is your opinion affected any by the fact that it has been about 2-½ years since the accident happened and he is still suffering pain in the back? Does that affect your opinion as to how long he will suffer pain? [253]

Mr. Gallagher: Just a moment. That is objected to because it assumes as an actual fact the element that the libelant is suffering pain in his back.

Mr. Hon: The witness testified he was suffering, and I will refer to the question if that is the case.

Mr. Gallagher: No; he didn't. He said the libelant told him he suffered pain in his back.

Mr. Hon: I will withdraw the question.

Q. Doctor, assume that this accident happened approximately 2-½ years ago, and assume that Mr. Richardson is still suffering from pain, according to his testimony, that he is still suffering from pain. Does that affect your opinion as to how long he will suffer pain in the back?

A. My opinion would be influenced more or less by my examination. On two separate examinations I have noticed that he has had pain more or less in different areas of his back. In other words, the pain on the two repeated examinations has not been consistent, the point of pain. And, there being no objective findings and his back being as flexible as it is, I don't feel that there is going to be any permanent back disability.

(Testimony of John S. Stephens)

Q. Doctor, you stated, I believe, that the first complaint of pain was over the sixth lumbar vertebra.

A. Over the fifth.

Q. That is down in the small of the back, isn't that [254] right?

A. It is down in the small of the back; yes.

Q. And that would be the fifth vertebra up from the sacrum?

A. It is right in the small of the back, in the middle.

Q. Doctor, isn't it true, that you get more pain when you sprain your back over that region than other regions, except the cervical region, because of the excessive motion in that particular part of the back?

A. We are more apt to see back injuries in that region and that is because of the flexibility of that region. We don't know why it is.

Q. But it is there, isn't it?

A. I don't think that is the cause but, at any rate, that is the commonest place for pain in the back.

Q. As to this left heel, what were his complaints on the left heel that he made to you?

A. He says, "Well, it bothers me. My left leg bothers me. My left heel bothers me. My left heel, the bone is bruised and it aches all the time I am on it." That was two years ago.

Q. Doctor, his condition would affect his taking part in any type of a sport, any that required physical exertion, wouldn't it? [255]

A. I have already stated that certain types of sport—I should imagine he wouldn't be particularly good on the hurdles, but other things I imagine he could participate in.

(Testimony of John S. Stephens)

Q. Is a hurdle about the only thing you think he couldn't do?

A. I imagine that is one of the few things he wouldn't be very good at.

Mr. Hon: That is all, Doctor.

Redirect Examination

Q. By Mr. McHose: Doctor, I have two points I would like to bring out. If Mr. Richardson had injured his back at the time of this fall, would you expect that he would complain of back pain shortly after that?

A. As a rule, he would. It might be, in a sense, influenced by the fact that he was having more pain probably in his femur than he was in his back. I mean in that sense it might have masked his symptoms.

Q. If there is no mention made in the Naval Hospital record, Libelant's Exhibit 1 in this case, of any complaint of pain in the back from the period of August 7, 1944, through January 1, 1945, would that mean anything to you as far as determining whether he did actually injure his back in this fall?

A. Well, I shouldn't imagine that he had any severe injury or I am quite certain he would have complained of it. [256]

Q. Doctor, there is one other point. You have stated that there was a certain situation in which trauma might cause varicose veins and you explained that situation in some detail. Will you explain whether that situation exists in this case?

A. I don't feel that it does because he gives evidence of his deep veins being patent or open.

Q. Doctor, one other thing I wanted to ask you. You examined his left leg, too, did you not, when you made this examination?

A. Yes, sir.

(Testimony of John S. Stephens)

Q. Does he also have varicose veins in his left leg?

A. To a lesser degree, yes, sir, but they are developing.

Mr. McHose: That is all.

Recross Examination

Q. By Mr. Hon: Doctor, Mr. McHose asked you if your opinion was affected if he made no complaint of pain from the date of accident, which was August 6, 1944, to January 1, 1945—

Mr. McHose: I am merely referring to your exhibit.

Q. By Mr. Hon: Would your opinion be changed any by the fact that during that time, the small of his back—or that he was wearing a cast, a rigid cast, from the waist down all the way, keeping that entire right side rigid from the [257] waist down?

A. I have already stated that I think for a few days at least it would have masked the symptoms.

Q. Yes, but, Doctor, isn't it a fact that such a cast would have kept the small of his back in a rigid position and prevented it from making those rotating movements? Isn't that true?

A. Yes; in a sense, it would.

Q. And that would alleviate the pain greatly, wouldn't it, Doctor?

A. If he had had a sprain of the back, the immobilization and the rest would have relieved the pain; yes. But it just so happens that frequently people without back injuries, when put in a Spica cast, complain sometimes

(Testimony of John S. Stephens)

quite bitterly of their back for a period of days because of the position that we place them in. So I can't say definitely that it would be masked.

Q. Doctor, isn't it true that sometimes in an acute sprain of the small of the back, including the lumbo sacral region of the back, they often completely immobilize the small of the back? A. Yes.

Q. To alleviate the pain?

A. Yes. As I stated before, it will relieve the pain and gives them rest. [258]

Q. So, Doctor, to your professional mind, it would not be incredible to your mind professionally if this man did not have pain in the back until after he completely quit wearing the cast? That is highly probable, isn't it, sir?

A. Not highly probable but it is possible.

Mr. Hon: That is all. Well, just one minute—

The Court: Just one question. You examined him a short time ago and observed that discoloration in the lower part of the right leg, is that correct?

A. Yes; that is the eczema I am referring to.

The Court: Is that a skin condition?

A. That is a skin condition as a result of the varicose veins.

The Court: Is that curable?

A. As I said before, if the veins are eliminated or treated by one of many methods, the eczema will clear up, but it will leave some pigmentation on his legs.



(Testimony of John S. Stephens)

The Court: Does that affect any parts of the muscle?

A. No. It is purely in the skin. Of course, the skin in that region is very thin, it being directly on the bone, and for that reason this was probably more apt to be infected.

The Court: Do you know whether that eczema condition causes or did cause itching but which could be corrected by this operation that you speak of?

A. Yes, sir. [259]

Q. By Mr. Gallagher: Doctor, it is my understanding of your testimony that this young man's eczema and varicose veins have no relationship to the injury he received on August 6, 1944?

A. That is my opinion; yes.

Mr. Gallagher: That is all.

The Court: Is there anything further?

Mr. McHose: Nothing further.

Mr. Hon: I will stipulate the witness may be excused if you wish.

Mr. McHose: Thank you. I have one other witness I don't like to bring back tomorrow morning. You have all of your case in except the interrogatories?

Mr. Hon: I think I have.

Mr. McHose: Is that all right with you, Mr. Gallagher?

Mr. Gallagher: If he is a short witness. I would have one, too, but I doubt very much if we could accomplish anything in 20 minutes.

Mr. McHose: Mr. Harrington.

WILLIAM A. HARRINGTON,

a witness for the respondent Bethlehem Steel Company.  
being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. William A. Harrington. [260]

Direct Examination

Q. By Mr. McHose: Mr. Harrington, are you connected with Bethlehem Steel Company?      A. I am.

Q. What is your position?

A. I am assistant manager.

Q. What are your general duties?

A. I am in charge of repairs and, as a matter of fact, in charge of all of the work in the yard, the production work and, also, in charge of sales.

Q. How long have you been connected with ship repair work, Mr. Harrington?

A. My first employment in ship repair work was in 1923; January 1st.

Q. Have you been in it ever since that date?

A. At the same yard.

Q. Did Bethlehem Steel Company perform certain repair work to the tanker Frank Drum in July and August, 1944?      A. They did.

Q. Where was that work done?

A. At the San Pedro yard.

Q. Was that done pursuant to an oral or a written agreement?

A. It was an oral agreement, with the price agreed upon. [261]

Q. Will you explain that to us?

A. I brought my brief case with me if I can have it. It is in the second pew there.

(Testimony of William A. Harrington)

Q. Yes.

A. During the war period, we were called upon by the operators of the ships and marine superintendents, who inquired as to whether we could undertake work. The work was generally allocated by a coordinator to ship conversion and repair. Many times, if an operator wished to get his ship into a particular yard, he would make contact with a man who had charge of taking the job and ask him if it were possible to get into the yard. In this manner, we would make contact then with the coordinator and tell him they wished to come in and the job would be allocated to our yard.

The Court: Do you want that information or was there some other information you wanted?

Mr. McHose: That is preliminary, your Honor.

Q. What we are interested in is this particular case, Mr. Harrington. How did the Frank Drum happen to come into the yard?

A. It came into the yard in that manner, in which the marine superintendent made application to me and I got hold of the coordinator.

Q. Who was the marine superintendent?

A. Oscar Lundin. [262]

Q. The marine superintendent of what company?

A. The Associated Oil Company.

Q. He asked you if you would repair the ship?

A. Yes.

Q. For whose account?

A. For the Texas Company, or I mean the Tide Water Associated Oil Company.

(Testimony of William A. Harrington)

Q. Did you then get the approval of the coordinator for that work?

A. I did get the approval of the coordinator for that work and have a form from the coordinator, dated July 21st authorizing us to oversee the repairs.

Q. Then were specifications prepared in the form of a sale order?

A. The first thing we received from the Associated Oil was a form carrying the C. M. P. allotment serial number, calling for the drydocking of the vessel and some normal underwater repairs. That was then followed up by a survey for some of the owner's repairs after the vessel arrived in the yard. It happened that there were some damaged plates on the ship due to collisions with the Army and the Navy, and surveys were held and we made an estimate of the probable cost to repair the work, and we agreed upon the price across the table.

Q. With whom did you reach that agreement? [263]

A. We agreed with Mr. Lundin, representing the Tide Water Associated Oil, and the underwriter surveyors as well.

Q. Were those agreements confirmed in letters?

A. They were confirmed in letters and copies were made.

Q. Do you have copies of those letters?

A. I have. You will also find with the copies of the letters the sales orders which form the specifications calling for the repairs.

Q. In other words, there are attached here in one file a number of letters of varying dates? These are copies

(Testimony of William A. Harrington)

of the letters that were in your file, that were sent to the Tide Water Associated Oil Company?

A. That is right. I had the girl copy those letters from my own office file copy that was made at the time she typed the original letter.

Q. And it was pursuant to the letters and this sale order that this work was done?

A. That is right.

Q. And the work was done for the Tide Water Associated Oil Company?

A. Yes; it was billed to them.

Q. And did they pay you for it?

A. They did.

Mr. McHose: I would like to offer in evidence the letters and the sale order and the agreement for the repairs in this [264] case. Is there any objection?

Mr. Gallagher: I don't have any.

The Court: They may be received. They should be perhaps designated as a Bethlehem Steel Company's exhibit rather than a joint exhibit.

Mr. Gallagher: I have no objection to it going in as a joint exhibit.

Mr. McHose: Then, it might go in as a joint exhibit.

(Joint Exhibit D.)

The Court: The witness used two designations. He used Associated and Tide Water. Is that one concern that you are talking about?

Mr. Gallagher: Yes; Tide Water Associated Oil Company.

(Testimony of William A. Harrington)

The Court: I just wondered if two different concerns were involved here.

A. Your Honor, it was the Tide Water Associated Oil but, for short purposes, we refer to them as Associated. That was the original name of the company until taken over by Tide Water.

Q. By Mr. McHose: Was there any other written contract between Tide Water Associated and Bethlehem Steel Company with respect to the work which you did on this ship?

A. I don't understand you.

Q. Was there any other written agreement, other than what we have put in evidence here, between Tide Water Associated [265] and ourselves?      A. No, sir.

Q. This covered all of the work you did on the ship for Tide Water Associated Oil Company?

A. Yes, sir; that is right.

Q. At the same time, did you also do some work for the War Shipping Administration?

A. That is right; at the same time.

Q. In other words, there was some work that the War Shipping Administration ordered you to do for their account?

A. Yes; the War Shipping, as I understood, although I haven't it right in written papers. But I was informed that it was the intention of the War Shipping to allocate the ship to the Navy. And, since the Navy carried greater crews than were carried by commercial companies, they wanted the icebox increased in size and, also, the Navy wanted certain items of ordnance work carried out. This work we did for the account of the War Shipping.



(Testimony of William A. Harrington)

Q. You did that simultaneously to doing the owner's repairs? A. That is right.

Q. But you billed those repairs separately to the War Shipping Administration?

A. That was billed to the War Shipping Administration.

Q. In connection with the work that was done, was certain [266] work done which necessitated going into the port bunker tank?

A. Yes. That was one of the damage jobs.

Q. Was that work done for the account of the Associated Oil Company?

A. That is right.

Q. The War Shipping Administration had nothing to do with it? A. Nothing at all.

Q. Would you indicate on the contract letter here the part that covered that particular work?

A. This item, to renew the shell plate.

Q. This is on a letter of August 2nd?

A. A letter of August 2, 1944, entitled "Claimed U. S. Damage—No. 1."

Q. You are marking that with an "X"?

A. An "X" out here and this item here.

Q. The two items here, "Renew Shell Plate No. 5" and "Crop After End of Shell Plate No. 6"?

A. Yes, sir.

Q. It was necessary to do that, was it, as shown on that sales order? A. Yes, sir.

Q. Will you check on the sales order the same items?

A. That is these items here and internals. [267]

(Testimony of William A. Harrington)

Q. Mr. Harrington, pursuant to that contract, did the Frank Drum come into the Bethlehem Shipyard?

A. The Frank Drum was already in the yard when we made that contract.

Q. When that contract was made?                      A. Right.

Q. Did Bethlehem Steel Company at any time take the possession and control of that ship?                      A. No.

Mr. Gallagher: That is objected to upon the ground it calls for the conclusion of the witness.

The Court: Objection sustained.

Mr. Gallagher: And I move to strike the answer.

The Court: Motion sustained, or granted.

Mr. McHose: This witness knows, your Honor, whether the Bethlehem Steel Company took possession and control.

The Court: He may tell what was done.

Q. By Mr. McHose: When the ship came into the yard, did the Tide Water Associated Oil Company maintain a person in charge of the ship?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion of the witness. If he wants to testify he went down to the boat and saw somebody on there, that would be all right, but I think this question calls for conclusions.

Q. By Mr. McHose: Let me ask it this way. Do you have [268] an established practice and policy at the Bethlehem Steel Company with respect to the ships that come into your yard?

Mr. Gallagher: That is objected to on the ground it is immaterial.

(Testimony of William A. Harrington)

Q. By Mr. McHose: I will narrow the question down to this: so far as your undertaking to be responsible for such a ship is concerned.

Mr. Gallagher: That is objected to upon the ground it would be utterly immaterial whether they had a custom or practice of that kind.

The Court: That objection is sustained. It seems to me you can get at what you are trying to elicit from this witness—we know that this vessel came into that yard. That is the testimony. Now, what was done or who came aboard or what was done by the respective parties in connection with it? I think you can arrive at it in that manner rather than to ask questions which bear upon legal conclusions.

Mr. McHose: Your Honor, I would like to make an offer of proof by this witness. I offer to have him testify that the Bethlehem Steel Company has a long-established policy and custom in connection with all ship repairs that they will not at any time take responsibility or take possession or control of a ship which comes into the yard. There is nothing in this contract that covers the situation either way. The only provision in the contract so far as Bethlehem Steel Company [269] responsibility is concerned is they will only be responsible for something that is a direct result of their own negligence. This is a custom and a practice that all of the ship repair people and all of the ship owners are quite familiar with, and I make an offer to prove that by asking Mr. Harrington direct questions.

The Court: You may prove that if you can arrive at that situation with facts that you wish to elicit from this witness.

(Testimony of William A. Harrington)

Mr. McHose: How can I do so without asking him whether they took possession and control of the ship, which is a question of fact?

The Court: That calls for a legal conclusion.

Q. By Mr. McHose: Did you send anyone to that ship to take charge of it when it arrived in the yard?

Mr. Gallagher: That is objected to upon the ground it is compound and calls for a conclusion of the witness and is merely an attempt to go through the back door when blocked at the front door.

Mr. McHose: I think my offer of proof is proper and I think that question is also proper.

The Court: Did his company send someone on board to take charge? He may answer that first part of it but not the last part of it.

Q. By Mr. McHose: Did you send anybody on board the [270] ship when it came into the yard, Mr. Harrington?

A. Naturally, we always send foremen and superintendents aboard.

Q. What did those men do?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness unless he was there.

Mr. McHose: He is in charge of the shipyards.

Mr. Gallagher: I don't think that would make any difference. He can't give his conclusions as to what these superintendents did.

The Court: He may testify to what instructions were given to the superintendents.

(Testimony of William A. Harrington)

Q. By Mr. McHose: I will reframe the question and ask it that way.

A. We gave these superintendents the specifications and told them to go aboard the ship and carry out the work.

Q. And did they do that?

A. They did.

Q. Were there times when that ship was in the yard when there was no representative of your company on the ship?

A. On Sundays, when no work was carried out, or on Saturday nights and Sunday nights.

Q. Do you know who was on board the ship at those times?

A. I don't remember now. [271]

Q. Do you know whether the persons on board the ship were employees of someone other than Bethlehem?

A. I know that the ship operator must keep a skeleton crew aboard the ship.

Q. Was that done in this case?

A. That was done.

Mr. McHose: I think that is all.

Mr. Gallagher: Have you any questions?

Mr. Hon: Go ahead, Mr. Gallagher.

#### Cross Examination

Q. By Mr. Gallagher: Mr. Harrington, were you at the shipyard on Sunday night, August 6, 1944?

A. I can't answer that definitely.

Q. Do you remember the day of the accident involving this young man here?

A. No. The first information I had of it was on Monday.

(Testimony of William A. Harrington)

Q. Where do these vessels—withdraw that. This particular vessel was out of navigation during all of the time it was at your yard, isn't that right?

Mr. McHose: What do you mean by "out of navigation"?

A. The engine was dead and no power was generated.

Q. By Mr. Gallagher: It was there getting a general overhaul, wasn't it?

A. If you mean immobilized; yes. [272]

Q. Well, it was being repaired, wasn't it?

A. Yes.

Q. Just like you take an automobile in a garage and have it fixed?

A. No, not the same status.

Q. Whose yard was that?

A. It was the Bethlehem Steel Company's.

Q. Whose dock was it?

A. The Bethlehem Steel Company, as far as I know.

Q. And where did the ship get its electricity?

A. From the yard.

Q. From the Bethlehem Steel Company?

A. Right.

Q. In other words, there was no plant in operation on the ship or in the ship?

A. I can't swear as to that. They may have had an auxiliary running, using power from the dock.

Q. Well, do you know?

A. No. That is the reason I said I couldn't answer it.

Q. You said that on Sundays no employees of Bethlehem ever went aboard those ships or this particular ship?

Mr. McHose: He did not say that.



(Testimony of William A. Harrington)

Q. By Mr. Gallagher: Is it your testimony, Mr. Harrington, that there were no employees of the Bethlehem Steel Company aboard the Frank Drum on August 6, 1944? [273]

A. I can't say for sure. There may have been. That is a long time ago.

Q. Do you know the names of the individuals who came aboard that vessel after this accident happened and roped off the hatch and installed a light over it?

A. No; I can't swear that we did that.

Q. You don't know whether you did it or didn't?

A. I don't know.

Q. The reason you don't know that is because you don't know the names of the individuals who came aboard, is that right? Isn't that right?

A. I think you are putting the question to me in a manner that would indicate that we are admitting that we did something or didn't do something. If I was to say I didn't know the names of the men who came aboard that ship to rope it off, that would be an indication of some liability and, since I didn't know it was roped off, I can't say I know a thing about it.

Q. How many men did you have working on that vessel?

A. That I can't answer. During the progress of the work, we would have as many as 10 and 20, though. Just how many on the ship I can't answer at this time.

Q. Have you seen your company records showing how long work was going on in that bunker hatch on August 6, 1944?

A. That can be gained from the records; yes. [274]

Q. Have you that record? A. No.

(Testimony of William A. Harrington)

Q. Could it be gotten from the records of the company?

A. I think it could; yes, sir.

Q. Isn't it true you could also get from the records of the company the names of the men who were working on that ship?

A. That is true.

Q. Did you go aboard that ship yourself before the work was started? A. No.

Q. Did you go aboard the ship at any time while the work was in progress? A. Yes.

Q. Did you go aboard the ship at any time before the work in the port bunker hatch was completed?

A. Yes.

Q. And was that after this accident had happened that you went aboard?

A. I couldn't answer that.

Q. Well, you found out about the accident on Monday following the accident, didn't you?

A. That is true.

Q. And did you go aboard the ship at that time?

A. No. [275]

Q. Did you go aboard the ship within a day or two after you found out?

A. I can't answer that.

Q. Well, what was the occasion upon which you went aboard while the work in the port bunker hatch was going on?

A. Merely in routine inspection of work around the yard.

(Testimony of William A. Harrington)

Q. What did you see with reference to the port bunker hatch on that day?

A. My inspection was down in the engine room, where a plate lapped over from the bunker hatch into the engine room, in which an additional item of work was involved.

Q. Did that work involve the port bunker hatch?

A. It did.

Q. That port bunker hatch was a fuel tank, wasn't it?

A. That is right.

Q. Will you produce the records, that are available to you, showing when the work was started on the port bunker hatch and when the work was finished on the port bunker hatch?

A. The records can be procured from the company; yes.

Q. And they are subject to your control, aren't they?

A. Not entirely; no.

Q. You are a ranking executive here in this office, aren't you?

A. The account department is handled by a separate vice [276] president.

Q. You can get them, can't you?

A. I can ask for them.

The Court: You can make a request upon counsel for them.

Mr. McHose: Your Honor, I would like to make a statement. I have been trying to get records, that might

(Testimony of William A. Harrington)

be records of some use in the trial of this case, for a long time—

A. We employ thousands of men down there.

Q. How many men did you have employed at that time?

A. During that period there was in the neighborhood of 8,000 men.

Q. And, when work is done in connection with a ship, some of the work is done in the shops on shore?

A. That is right.

Q. And timecards are kept of the men who do work in the shops on shore?      A. Yes, sir.

Q. And other records are kept of the men who work on the ships, is that right?

A. That is right.

The Court: Has any request been made for those records?

Mr. McHose: No request has been made, but we have been unable to find any records of who did work on this particular bunker hatch.

Mr. Hon: If the superintendent of repairs has a memorandum [277] as to what he knows about it, if you will tell us what you want, he will make an effort tonight to get the records you want.

Mr. Gallagher: I want to find out when the work was started in the port bunker hatch and when it was finished. I want to know how many men were working on the ship making those repairs and who they were.

(Testimony of William A. Harrington)

Q. As I understand it, Mr. Harrington, you did keep time cards showing the name of each employee who worked aboard the ship?

A. Yes; they kept time cards of every employee who worked in the yard but whether they are detailed for each man working on a particular item is something I wouldn't swear to. For instance, you may start a man out in the morning on a bunker tank and then we would get a call from the Navy for assistance on a ship and there would be a transfer of men from that bunker tank to this other Navy ship. In that case, the records may be more or less upset and it might be, on account of that, Mr. McHose is having difficulty.

Q. Mr. Harrington, assume that, when this ship came into the yard of the Bethlehem Steel Company, the port bunker hatch was roped off and the cover was held at about a 45-degree angle by means of a stiff leg, and your men were going to perform work down in that bunker hatch consisting of installing the staging and doing lifting, they would open up the bunker hatch to permit [278] them to get down into the hold, wouldn't they?

A. Yes, sir.

Q. And, in order to get all of this material down, your workmen would have to open the bunker hatch and lay the cover back against the bulkhead immediately behind it, wouldn't they?

A. It has been done; yes.

(Testimony of William A. Harrington)

Q. Isn't that the usual custom?

A. Not always.

Q. But you knew it had been done?

A. It has been done; yes.

Mr. Gallagher: I will offer this picture in evidence, your Honor, for the purpose of illustration, as respondent Tide Water Associated Oil Company's Exhibit E.

Mr. Hon: Your Honor, I don't think I am going to object but I want to get one thing straight. That is one of the steps to illustrate what you intend to prove and connect up later as being the condition of the bunker hatch at the time the Bethlehem Steel Company took over?

Mr. McHose: I would like to ask a couple of questions.

The Court: I am willing to work as long as you men are. Do you want to go ahead?

Mr. McHose: I think, under the circumstances, I will ask Mr. Harrington to come back tomorrow and also ask that you find out whether you can get the records we asked for. I will [279] talk to you about that after court.

The Court: I think you had better try to find the records that have been requested here and then we can resume in the morning.

Mr. Gallagher: Here is what I would like to know, if it is possible to find it out, and that is who were the men



(Testimony of William A. Harrington)

who first went to work on that bunker hatch, so that we can get the names of the individuals who took off that roping and who laid it back against the bulkhead.

Mr. McHose: Mr. Gallagher, I object. There is no evidence in this case about that. I am also, Mr. Gallagher, going to object to the use—

The Court: We will consider admitting that photograph in evidence in the morning.

Mr. Gallagher: I will have at least four witnesses to testify to it. I am asking for their records of their employees.

The Court: If you ask for that record, I think you are entitled to have it, any of the employees who were on the premises in connection with this work, whatever it was.

Mr. McHose: I wanted it myself and I haven't been able to get it.

The Court: This picture may be marked for identification and then you may renew your offer later.

Mr. Gallagher: Will your Honor instruct the witness to [280] return?

The Court: Do you want to begin at 9:30 or 10:00?

Mr. Hon: I would rather begin at 10:00.

The Court: This matter may go over until tomorrow morning at 10:00 o'clock.

(Thereupon, a recess was taken until 10:00 o'clock a. m., Thursday, February 13, 1947.)

Los Angeles, California, February 13, 1947, 10:00 o'clock A. M.

(Same appearances.)

WILLIAM A. HARRINGTON,

the witness on the stand at the time of adjournment, being previously duly sworn, resumed the stand and testified further as follows:

Mr. Hon: Your Honor, I believe that we should introduce that blueprint into evidence so it will become part of the records.

The Court: Is there any objection?

Mr. Gallagher: No objection.

The Court: It may be received and marked as Libellant's Exhibit No. 2.

Mr. Hon: Mr. McHose, you agree on that offer, don't you?

Mr. McHose: Yes. I have no objection.

Cross Examination (Resumed)

Q. By Mr. Gallagher: Mr. Harrington, have you had an opportunity to examine the records of your company for the purpose of finding out when the work being done by the Bethlehem Steel Company in the port bunker tank was finished?

A. Those records are in the court room now.

Q. Will you produce that record, please?

Mr. McHose: May I suggest we might put Mr. Taylor on the stand? Mr. Harrington doesn't understand accounting. [282] your Honor.

Mr. Gallagher: I just want to ask Mr. Harrington a couple more questions on another line.

(Testimony of William A. Harrington)

Q. Mr. Harrington, when you testified that you sent the superintendent on board the Frank Drum to direct the work that was being done by the employees of Bethlehem, to whom were you referring?

A. I was referring to the superintendent of hulls and the superintendent of machinery.

The Court: Superintendent of what?

A. Superintendent of hulls and machinery.

Q. By Mr. Gallagher: Who was the superintendent of hulls? A. Mr. Courtiour.

Q. Would he have charge of the gang doing the work in the port bunker tank? A. He would.

Q. And was it his job to be on the ship while that work was being done?

A. His representatives and foremen would do so; yes. He, personally, during that time could not have possibly been on that particular job. It must be understood that we were in the middle of a war hysteria, in which ships were crowding into the yard and he had men under him to whom he delegated the work. Naturally, the custom of the company is— [283]

Q. I didn't ask you anything about the custom.

A. His duty—may I put it that way—is to make a routine inspection when it is possible.

Q. You have some information with reference to the names of the foremen on the job at that time, don't you?

A. I think Mr. Courtiour can give that; yes.

Mr. Gallagher: I think that is all, your Honor.

Mr. McHose: Are we going to finish with this witness before we put the other one on?

The Court: Have you some more questions?

(Testimony of William A. Harrington)

Mr. McHose: Yes. I wanted to clear up the matter that we raised last evening, when I asked Mr. Harrington questions concerning the responsibility for the vessel when it came into the yard and I made an offer of proof. I think the law is established, your Honor, that evidence of custom and usage, not to vary the terms of a written agreement but to explain the terms of a written agreement which is silent on a particular question, is admissible.

The Court: You refer to what in this case when you say "written agreement"?

Mr. McHose: The written contract between the Associated Oil Company and the Bethlehem Steel Company. That contract does not contain any provisions with respect to responsibility for the ship coming into the yard.

The Court: Let's see what contract you refer to.

Mr. McHose: We introduced it yesterday. [284]

The Court: Is this the sales order slip?

Mr. McHose: Respondent's Exhibit D.

The Court: Will you point out the contract that you have in mind?

Mr. McHose: This was the contract under which the work was done but it is supplemented, your Honor, by a well understood agreement between the parties, which is established by custom and usage in this port not only so far as the Bethlehem Steel Company is concerned but so far as all other shipyards are concerned. That custom and usage which I wish to prove by asking a question of Mr. Harrington is that the ships are always in charge of a master when they come into the shipyard or the shipyard doesn't accept responsibility for them. The master must always remain on board and is responsible to the

(Testimony of William A. Harrington)

owners. That is a custom that is commonly understood and is followed by all of the shipyards and is well known to the Associated Oil Company, the other party to this contract. And I have authorities here which state that testimony to that effect is admissible and, if your Honor still questions the point, I would like to refer to these authorities.

The Court: You directed your question and asked who was responsible and that word "responsible" means everything in this lawsuit in the way of a conclusion.

Mr. McHose: That is right; that first question was objected to and you sustained the objection and I did not press [285] the point but I asked another question, to which you sustained an objection and, to make my position clear this morning, I would like to re-ask that question.

The Court: Very well.

#### Redirect Examination

Q. By Mr. McHose: Mr. Harrington, is there an established custom and usage, not only with respect to Bethlehem Steel Company but also with respect to other shipyards in Los Angeles Harbor, in so far as the acceptance of responsibility and acceptance of possession and control of a ship which comes into your shipyard is concerned?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion and it is incompetent, irrelevant and immaterial. This is not an action on a contract. This is a tort action.

The Court: You are getting right back to where you started before. You are trying to establish, by custom,

(Testimony of William A. Harrington)

a legal responsibility without going into facts. You have a right to produce whatever facts there are in connection with what was done or is being done in cases of that kind, but, when you use the word "responsibility" and words of that character, that call for the judgment of the court—

Mr. Gallagher: May I suggest one further thing to your Honor? Suppose Mr. McHose were able to go all the way on this thing that he is advancing at this time and could produce [286] a written contract pursuant to which the Tide Water Associated Oil Company agreed to be responsible for all damage that might occur on the ship, whether it was the negligence on the part of the employees of the Bethlehem Steel Company or somebody in the employ of the ship owner or negligence on the part of anybody. Obviously, that kind of a contract wouldn't be admissible in evidence here in so far as this libellant is concerned, even—

The Court: Even if it were a written contract?

Mr. Gallagher: Even if it were a written contract.

The Court: I don't see why not. The written contract is competent to show what was being done and the relationship of the parties.

Mr. Gallagher: But what I am talking about is this. Suppose there happened to be an indemnity agreement in this contract. Suppose Bethlehem Steel Company agreed as part of the contract to indemnify Tide Water Associated against liability of loss or whatnot, and then this libellant brings a suit against Tide Water and he alleges that Tide Water is responsible for his injury. We couldn't introduce that contract in evidence in this case. The libellant is not a party to the contract. This is a case founding in tort and, while the relationship between



(Testimony of William A. Harrington)

Bethlehem and Tide Water is important only to the extent of showing what each was doing with the ship, it certainly has no other bearing on the case. [287]

The Court: Let me see the contract that you are alluding to now. Maybe there is something in there that I haven't noticed.

Mr. McHose: Mr. Gallagher has just made a statement of law which is not true. In the case of Porello v. United States, there was an agreement between the ship repair yard and the United States, which was operating the vessel, and the court permitted an indemnity agreement to be pleaded and held there was responsibility under that agreement. We are now in the realm of this case which has to do with responsibility between the Bethlehem Steel Company and the Tide Water Associated Oil Company.

The Court: Let me look at this for a moment.

Mr. Gallagher: Your Honor, I find nothing there that says anything about acceptance of responsibility for the ship.

Mr. McHose: My offer of proof is to prove what that custom is. Mr. Gallagher is making this situation difficult, although he knows and the Associated Oil Company knows, perfectly well, that, when that ship came into the yard, they had to maintain their own officers on board and had to be responsible for that ship. He is making it difficult. But at this stage I want to make an offer of proof to prove by this witness that a well-established custom and usage in this Harbor existed, although there is nothing said about it in this specific contract, but, under that, Associated Oil Company [288] knew and understood, when they brought that ship into the yard, they

(Testimony of William A. Harrington)

had to maintain someone in charge of it, and I think that is proper evidence.

The case of *Van Ness v. Pacard*, 7 Law Ed. 374, an early Supreme Court case decided by Justice Story, had to do with an agreement between landlord and tenant in respect to matters in which the parties were silent; nothing was said in the contract about it. And the judge said this "may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be cognizant of the custom, and to contract with a tacit reference to it." [289]

Section 1655 of the California Civil Code provides,

"Stipulations which are necessary to make a contract reasonable, or conformable to usage, are employed in respect to matters concerning which the contract manifests no contrary intention."

There are a number of cases under that section and under Section 1870 of the Code of Civil Procedure, which permits the testimony of usage or custom not to vary or contradict a written contract but to explain something in connection with the written contract which the contract itself is silent with respect to.

The Court: Here we have a written contract, an order for some work and an agreement to do the work. You are talking about something else. You are not throwing any light on the surrounding circumstances in relation to the repairs.

Mr. McHose: I see what your Honor is thinking. The only reason I am going into this at all is because

(Testimony of William A. Harrington)

Mr. Gallagher has in the position he has taken in this case attempted to say that the ship was brought into the Bethlehem yard and that the Associated Oil Company had nothing further to do with it.

The Court: Let's see if we can clarify the situation. I think you have already established the fact that this vessel came in with a stand-by crew. The rules are in evidence. That crew is there. I don't think you need any more evidence on [290] that score as to who was in charge of that vessel in so far as the rules are concerned and in so far as what actually took place is concerned. Now, we get down to the question of responsibility in this transaction. The theory of the owners of the vessel is that the shipyard was responsible and your theory is that the other people were responsible. Those matters all are to be established by questions of fact. Assuming that the vessel was in charge, as I think it was, of the crew, if your people did something that would be a negligent act, of course, we would have to determine then what responsibility was attached to it. I don't think you can establish by custom a responsibility.

Mr. McHose: We wouldn't be talking about this at all, your Honor, if Mr. Gallagher had not, in his pleadings and in his statements here in court and in his answers to the interrogatories which will be introduced later on, attempted to argue that he is in the position and Associated is in the position of you or me when we take our car into a garage and leave it with the garage keeper to repair it. Mr. Gallagher is saying that is an analogy to the situation here, which I want to satisfy your Honor is entirely different. The ship was never at any time in our possession and control and that is a well-established

(Testimony of William A. Harrington)

custom. I think the evidence to make that clear and support it in the case is admissible.

The Court: Assuming that you are correct in the matter, [291] nevertheless, if your workmen were negligent in doing anything they should have done in safeguarding the premises, the same as a contract, if they expose the work they are working on to hazards and dangers, you have a responsibility. This case will have to be decided on the facts of just what you did or failed to do, so as to establish negligence, if there is any to be established, and the same would apply to the owners of the vessel. The owners of the vessel bring that in with a skeleton or stand-by crew there. They claim, when they brought the vessel in there, the hatch was guarded with ropes or something of that kind. Now, if your employees took down those safeguards and permitted that to remain open and failed to replace them, or whatever the situation may be—I am not anticipating now—we will have to determine just what responsibility you have in the premises.

Mr. McHose: And that responsibility, your Honor, is dependent upon what responsibility we assumed for that ship.

The Court: If that crew was negligent in safeguarding those premises or any of them, if they failed to keep those premises safe, we will have to determine what their responsibility was but we would do that by testimony and not by a custom.

Mr. McHose: Then the proof is rejected, is it, your Honor, my offer of proof?

The Court: You may go ahead and prove the facts but, when [292] you use the word "responsibility,"—

(Testimony of William A. Harrington)

Mr. McHose: May we have a ruling on my specific question just for the purpose of the record?

The Court: Let me read this in here again. Was it intended that this fine print should be read by the contracting parties or was it there, just as these clauses are put in some of these conditional sales contracts, to make it almost impossible for anyone to read such fine print?

Mr. McHose: That fine print doesn't add anything to this case, your Honor.

The Court: I think it does. Have you read it?

Mr. McHose: We agree to be responsible for our own negligence if any damage was done to the Associated Oil Company's ship. We would be responsible for that even without the fine print in this agreement, and I don't think it adds anything so far as this case is concerned.

The Court: What do you think this word "accidents" means in that fine print?

Mr. McHose: I think you have to read the entire clause. We agreed and certainly do agree that we are responsible for our own negligence.

The Court: You say you will not be responsible for delays, delays caused by strikes, accidents, delay of carriers and other delays. Now, that word "accidents" means some kind of accidents. [293]

Mr. McHose: Yes, but only in case it results from our own negligence. There is one clause in that first letter of agreement, your Honor, that I might ask Mr. Harrington a question about, which might help you.

Q. Mr. Harrington, in this letter agreement, there is a paragraph, on the second page, which says you will, first, furnish fire watch in compliance with the regulations



(Testimony of William A. Harrington)

of captain-of-the-port. Will you tell me what that means, in the past?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness.

The Court: I think that is susceptible of explanation. I don't know what a fire watch is. Overruled.

A. Your Honor, the regulations of the port for repairing vessels in the defensive sea area carry that requirement, but it is a new requirement that has been invoked into the business, and it is an expense to which the operators were not to be put under normal peace-time conditions. It meant extra labor on the part of the fire watch to be placed underneath the deck where welding is being done on the deck, a fire watch on each side of a bulkhead where welding was being performed on the bulkheads.

The Court: What is a fire watch?

A. A fire watch is a man who stands by with an extinguisher to put out sparks or report a fire if a fire [294] breaks out.

The Court: That has to do with safeguarding the boat from danger by fire during the work that is being done, is that right?

A. That is right, your Honor.

Q. By Mr. McHose: And, under the contract, you provided a fire watch?

A. We provided a fire watch.

The Court: That does go to the meat of the proposition that you offered. Let's have your question again and I will give you a ruling on it.

(Question read by reporter.)

The Court: I suppose you have had time, Mr. Gallagher, between yesterday evening and this morning to



(Testimony of William A. Harrington)

bring in some authorities on this question of custom and usage, that you objected to?

Mr. Gallagher: I understood your Honor ruled on that yesterday. So I didn't bring any cases on it. I know I haven't been able to get any on custom and usage in a tort action. If you have an accident on a dock and a man is run over by a lumber carrier, one of these straddling affairs,— I have introduced evidence of custom and practice in that case. I represented the plaintiff in that kind of litigation but that was for the purpose of showing that the plaintiff was not guilty of contributory negligence in failing to keep [295] a constant lookout behind him for these carriers, and the evidence went to custom and usage that they always blew a horn before they started those things. But I can't see where custom and usage is of any materiality in this case at all because neither one of us claim that the libelant was relying on any custom or usage. He doesn't claim that he was and he wasn't a contract party. So I think that the entire case depends on plain, ordinary principles of tort litigation.

Mr. McHose: The whole question involved is one of responsibility, assuming the court should find the libelant is entitled to recover. Then the question for the court's decision will be is Tide Water Associated responsible or is Bethlehem responsible, and the question of the basis on which that ship was in the yard is highly important in the determination of that question.

Mr. Gallagher: The court might determine that both respondents are responsible or that neither respondent is responsible.

Mr. McHose: Quite true. If you had not raised the suggestion and inference that you have no responsibility

(Testimony of William A. Harrington)

for the ship after you brought it into our yard, I wouldn't be wasting time with this line of questioning because I think it is wholly immaterial. But you have raised that defense.

Mr. Gallagher: I have taken the position, your Honor, [296] and I think it is clear, that, when the vessel came into the shipyard, the port bunker hatch was secured. It had ropes around it and it was in about a 45-degree angle, and that the workmen employed by the Bethlehem Steel Company came aboard and, while they didn't assume total possession of the vessel, they certainly took over that part of the vessel where they were doing work; and, when they got through with it, it is our position they should have put it back in the position in which they found it, if they were going to come back to do some work; and, if they were all through with their work, they should have put it back in its previous condition; and that, if all facilities were under the control of Bethlehem, and, if anyone was required to light that part of the ship, they should have done it. And, as a matter of fact, they did come back and light it up.

Mr. McHose: You are making misstatements of fact.

Mr. Gallagher: No; I am not.

The Court: This is not the time to argue the case. Let's have that question.

(Question read by reporter.)

The Court: Responsibility for what?

Mr. McHose: Responsibility for the possession and control of the ship.

The Court: Responsibility for accidents or what?

(Testimony of William A. Harrington)

Mr. McHose: Well, I don't think the question need to go [297] to that extent. For instance, I own a piece of property and I take that property in to Mr. Gallagher and he is going to do some work on that property. He becomes responsible for it. But, if it is a ship and I maintain my captain on board, I am responsible for it.

The Court: You have to confine yourself to the one issue here.

Mr. McHose: Let's make it read this way, then, whether there is a custom or usage to take the possession and control of the ship which comes into the yard.

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion of the witness and is incompetent, irrelevant and immaterial.

The Court: That objection will be sustained.

Mr. McHose: I would like to make an offer of proof, your Honor. Is it necessary to make a statement or may we have an understanding I am making an offer of proof of that fact?

Mr. Gallagher: I am willing to stipulate counsel offers to get an affirmative answer of the witness to that question.

Mr. McHose: I am making an offer of proof of custom and usage in the repair business in this Harbor, that no shipyard takes possession and control of any ship which comes into this yard; that the possession and control at all times remains under the owner of the ship. And this custom and [298] usage, in my opinion, has

(Testimony of William A. Harrington)

the binding force of a contract between the Associated Oil Company and Bethlehem.

The Court: If you have an authority to that effect, I will listen to you but that authority I don't think is applicable that you just read.

Mr. McHose: I have no authority of a ship. There is no such case. But I cited the case of *Van Ness v. Pacard*, 7 U. S. 137, which is the landlord and tenant case to which I referred.

The Court: I don't think that will help us.

Mr. McHose: Also *United States Daily Publishing Corporation v. Nichols*, 32 Fed. (2d) 834, where evidence was permitted as to custom. I also referred to *Hanley v. Marsh & McLennan*, 46 Cal. App. (2d) 787, and a number of California cases cited in Witkin under "Contracts," Section 229.

The Court: We have Witkin in here. Let's find that right now.

Mr. McHose: I am sorry to be taking time with this because I don't feel it is important, but I feel the position in which Mr. Gallagher has placed me compels me to protect my client's position.

The Court: There is a rule that, while custom cannot excuse a negligent act, evidence of custom and usage has been admitted for the purpose of showing what constitutes negligence. But you are presupposing here—

Mr. McHose: I am not offering this evidence in any sense [299] as proving or disproving negligence. I am

(Testimony of William A. Harrington)

only offering it to show responsibility of the Bethlehem Steel Company shipyard at the time when that ship came into the yard.

The Court: Is it in the new work of Witkin?

Mr. McHose: The new one, Volume 1, "Contracts," Section 229.

The Court: There is a statement here, "But usage can only be invoked to interpret and not to create contractual terms."

Mr. McHose: I haven't the slightest intention of doing that.

The Court: What part of this contract do you wish to interpret?

Mr. McHose: There is no direct statement in that contract, your Honor. If the real contract between these parties had been written out in detail, Bethlehem would have put a provision in that contract, which would be substantially in this language, "It is understood and agreed that Bethlehem Steel Company does not take possession and control of any ship which comes into our yard if the possession and control of that ship at all times remains in Tide Water Associated Oil Company and in the master of the ship." There is no such provision specifically in that contract but that is well known and well understood by Mr. Gallagher's Tide Water Associated Oil Company. [299a]

The Court: You will have to prove that. That is a fact in this case. That vessel was brought in and was

(Testimony of William A. Harrington)

in charge of the crew apparently but that has nothing to do with the negligence of either party.

Mr. McHose: I think it does, your Honor. You must keep in mind an important fact in this case, that our men left the ship at 3:00 o'clock on Saturday afternoon. We had nobody on that ship all day Sunday. The accident occurred at 9:30 on Sunday night. During all of that time that ship was in possession and control of Tide Water Associated Oil Company. If your Honor should find that we should have left that hatch in some other condition than we did, my position is that your Honor then must find that the Tide Water Associated Oil Company, having had charge of the ship all day Sunday, should have corrected any condition that existed.

The Court: Both of you might have been negligent. If your employees failed to leave the ship in the condition in which they found it, that it is to say, with that safeguard replaced, there is a probability that your employees were negligent and that the employees of the owners of the ship, having observed that place open and having left it open, may have been negligent. I think those are the possibilities in this case notwithstanding the responsibility of the owners of the vessel and the general responsibility of the shipyard for the action. [299b]

Mr. McHose: I quite agree with your Honor. I think your analysis is exactly correct. One reason I am in this subject at all is because of the position Mr. Gal-



(Testimony of William A. Harrington)

lagher has attempted to take when he says, "We had nothing to do with the ship; we had no responsibility for it; we turned it over to you and have nothing further to do." That is the thing we want to justify. I think your Honor is satisfied in your own mind that is the case. I don't know what evidence Mr. Gallagher is going to introduce.

The Court: I will have to deny your offer. It is too broad and general and I don't think it meets the issues. [299c]

Mr. McHose: All right, your Honor. I will ask one or two other questions.

Q. Mr. Harrington, did you provide any watchmen for that ship while it was in the yard, other than the fire watch?

A. No. It was our custom to provide watchmen at the gangway when aboard the ship.

Mr. Gallagher: I move to strike out all of the answer excepting "No" upon the ground that the balance of it is not responsive and also states conclusions and is a voluntary statement of the witness.

The Court: The latter part of the answer may go out.

Mr. McHose: That may go out. That is all, Mr. Harrington.

Mr. Gallagher: That is all.

Mr. McHose: Mr. Taylor, will you take the stand.

JAMES E. TAYLOR,

a witness for the respondent Bethlehem Steel Company,  
being first duly sworn, testified as follows:

Mr. McHose: May Mr. Harrington be excused, your Honor?

The Court: Yes.

Mr. McHose: I am just wondering if perhaps we ought not to go back. I didn't think for a moment that you really had not completed your case.

Mr. Hon: Go ahead. I don't care. [300]

Mr. McHose: We also want to call Mr. Richardson to clear up that one point that was hanging yesterday.

The Clerk: Will you please state your name?

A. James E. Taylor.

Direct Examination

Mr. McHose: I want to make a statement before I turn Mr. Taylor over to Mr. Gallagher. I think Mr. Gallagher has put us in a very difficult position by the demand which he made yesterday, in the middle of this trial, to produce records which are voluminous and complicated. As I stated yesterday, I tried to find out the names of the men who might have been working in this bunker hatch on the day the accident happened, and I was unsuccessful in doing so, and Mr. Taylor's testimony will explain why. Mr. Gallagher knew, by my answers to interrogatories in this case, filed some weeks ago, that I did not have any detailed evidence on this and, yet, yesterday afternoon, he made this demand, which necessitated our men working late last night trying to get the information together. Mr. Taylor has brought up with him his records and you can ask him anything you want.

Cross Examination

Q. By Mr. Gallagher: Mr. Taylor, do you have records showing the names of the foremen or heads of gangs that worked on the Frank G. Drum at the time the first work in the port bunker hatch was done? [301]

A. I have records of the names of heads of gangs.

Q. Do you have any records at all showing where these various gangs were working on the ship?

A. No, sir.

Q. How many foremen did you have working on the ship on that day, when the work in the port bunker hatch was commenced?

A. A foreman as such is not charged—

Q. I didn't ask you whether he is charged with anything. I asked you how many you had there.

A. I can't answer that question.

Q. Your records don't show that?

A. No, sir.

Q. Who had general supervision and charge of that work being done in the port bunker hatch on the Frank G. Drum?

A. I am not in a position to answer that question.

Q. Did you have any superintendents?

A. We had superintendents; not under my jurisdiction.

Q. What is your jurisdiction?

A. My jurisdiction is the time spent, among other things.

Q. In other words, you are in the accounting divisions?

A. That is correct.

(Testimony of James E. Taylor)

Q. And you wouldn't know from looking at the records [302] who the superintendent was or who the foremen were that were on that ship?

A. That is correct.

Q. Who would know that in your company?

A. Mr. Harrington could testify to that.

Mr. Gallagher: That is all.

The Court: Is there anything further?

Mr. McHose: Yes; I think I will ask a few questions.

#### Redirect Examination

Q. By Mr. McHose: Mr. Taylor, do you have under your jurisdiction time records, which come in to your office, that show time spent on various jobs in the shipyard? A. I do.

Q. In August, 1944, were you engaged in a large number of jobs? A. We were.

Q. And about how many men did you have in your employ then?

A. We had at that time 4600 men or 4700.

Q. Do you maintain records which show a particular job, such as work on the Frank G. Drum, which show the time that is devoted to that job? A. I do.

Q. Will you tell the court just in as few words as you can how you keep those records and what they show? [303]

The Court: I think all of this should have been done before this trial. We are taking up a lot of time in your attempt to discover evidence which you have had ample opportunity to discover some time ago, before this case

(Testimony of James E. Taylor)

ever came to trial. As long as we have started on it, you may continue but let's not drag this out too much.

Mr. McHose: Your Honor, I am willing to conclude it with just a simple statement that Mr. Taylor will testify that his records, for example, on the 5th of August, show 165 men who did work on item No. 1 on a particular job, which was the Frank G. Drum, and that that meant that there were 165 men who might have gone down in the bunker hatch of that ship. Some of them did work in the tool and machine shops on shore and some of them did work on the ship.

Q. Of the 165 men, about how many might still be in your employ?      A. Probably 10 per cent.

Mr. McHose: And, also, we do not have accurate addresses of the others to trace them down. That is the reason why, a year after the accident happened, we are not in a position to give the names of the men.

The Court: As I understand it, you have no record available to show exactly who did the work and when it was done on this particular job?

A. I have that record; yes, sir. [304]

The Court: You have that record of the men?

A. Yes, sir.

The Court: But there are approximately 165 who participated in that work, is that correct?

A. Who spent all or part of their days on that.

The Court: On this particular item of work?

A. Yes, sir.

The Court: Do you have a record of the gang leaders?      A. Yes, sir.

(Testimony of James E. Taylor)

The Court: How many of those?

A. I don't know offhand. I could find out.

The Court: Approximately?

A. About one for each 10 men.

The Court: How many of those are in your employ, again? 10 per cent?

Mr. McHose: The superintendent will discuss that, your Honor.

The Court: Yes. Is there anything further?

Mr. McHose: That is all.

Mr. Gallagher: Nothing, your Honor.

Mr. McHose: May Mr. Taylor be excused and be permitted to take his records back with him?

The Court: That is up to Mr. Gallagher. Do you want to inspect the records?

Mr. Gallagher: No, your Honor. I thought they would [305] have some records showing the names of these men but Mr. McHose says the superintendent will clear that up. So we will get it from him.

Mr. McHose: The superintendent doesn't have the names of the men.

The Court: You don't want these records, is that correct?

Mr. Gallagher: No; that is correct.

The Court: You may be excused and take your records.

Mr. McHose: We would like to call Mr. Richardson again.

Mr. Hon: Are you calling him as your witness?

Mr. Gallagher: No; for cross examination.

Mr. McHose: No.



DAVID LAWTON RICHARDSON,

the libelant, being previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. By Mr. Gallagher: Mr. Richardson, at the time you stepped out onto the deck, you had let the curtain close behind you, hadn't you?

A. When I brought my right foot out, the curtain closed behind me as I brought it out.

Q. So that, since the curtain closed behind you, everything was dark out there on the surface of the deck?

A. As soon as it closed behind me; yes, sir. [306]

Q. And right then you were blinded to a certain extent, weren't you? A. Right then; yes, sir.

Q. In other words, you testify now the same as you did in your deposition, on page 20, "Q. And when you stepped through the door you saw that it was dark out there, didn't you? There were no lights out there?"

"A. I stepped out and I was kind of light blinded."? You remember that, don't you? A. Yes.

Q. And that was correct, was it?

A. That was correct.

Q. You recognized, since you got on that ship, the fact that it was a different type than you had ever been on before, didn't you?

The Court: Will you take your place back there?

Mr. Gallagher: I just wanted to show him this testimony on page 40, line 13 to line 18.

Q. Will you read that?

The Court: What did you want to ask? Do you want to ask him if he testified to that?

(Testimony of David L. Richardson)

Mr. Gallagher: Yes; I want to refresh his recollection to save time.

Mr. Hon: I will stipulate he answered it.

Mr. Gallagher: "Q. Well, when you got on that parti- [307] cular tanker that night it appeared to you that it was a different type ship than anything you had ever been on in your life; is that right?

A. It appeared to be a different type than I was used to."

Mr. Hon: Yes; he testified to that. There is no question about that.

Q. By Mr. Gallagher: Mr. Richardson, did you see any lights of any kind on the deck of the ship that night excepting at the head of the gangway, when you came up? A. Only in the passageway.

Q. That wasn't on the outside deck? That was inside where it was covered, wasn't it? A. Yes, sir.

Q. And those were bright lights in the passageway, weren't they? A. Yes, sir.

Q. When you stepped out of the exit from the port passageway, there were no lights in the vicinity of that door and no illumination of any kind after the curtain closed behind you, isn't that correct?

Mr. Hon: That has been asked and answered.

The Court: He said it was dark, didn't he? Wouldn't that exclude any theory of light?

Mr. Gallagher: I guess it would. That is all I wanted [308] to establish. If that is conceded—

The Court: Is that true,— A. Yes, sir.

The Court: —that it became dark—

A. When I brought my right foot out, that is when I fell.

(Testimony of David L. Richardson)

The Court: You let the curtain close behind you and it was dark? A. Yes.

Q. By Mr. McHose: You never did see the hatch into which you fell, did you?

A. No, sir; I never did see it.

Mr. McHose: That is all.

Mr. Hon: Shall I proceed with my case?

Mr. Gallagher: You may go ahead.

Mr. Hon: Or you may proceed. I can read my interrogatories at any time.

Mr. Gallagher: I think libelant might as well finish.

Mr. Hon: Okay. May it please the court, at this time we wish to read, first, answers to certain interrogatories, special interrogatories, which were prepared and filed and served on the respondent Bethlehem Steel Company, a corporation, under date of approximately November 7, 1946.

Mr. Gallagher: Before you do that, Mr. Hon, I assume it is understood that answers returned by the respondent Tide [309] Water Associated Oil Company are not binding on Bethlehem Steel Company and answers made by Bethlehem are not binding on Tide Water?

Mr. Hon: I would assume that would be true. Now, is it all right if I let Mr. Feintech read the answers and I will read the questions?

The Court: Yes.

Mr. Hon: Do you want him to take the stand and read the answers, your Honor? I will read the questions and Mr. Feintech will read the answers.

Mr. Feintech: Do you want me to be sworn, your Honor?

The Court: No; you are just reading something.

(Testimony of David L. Richardson)

Mr. Hon: These are the questions and these are the answers of the Bethlehem Steel Company, a corporation.

“Interrogatory No. 1—” As a preamble to these interrogatories, I will state as follows: “Special interrogatories addressed to respondent Bethlehem Steel Company: As used in the questions that follow, “stand-by crew” refers to those members of the ship’s company of the S. S. Frank G. Drum who had duties to perform in behalf of the ship while she was in a repair status at the repair docks of the Bethlehem Steel Company, and/or who were living aboard the vessel at that time. ‘Repair crew’ refers to those employees of the Bethlehem Steel Company who were engaged in repairing the S. S. Frank G. Drum while she was in a repair status.” [310]

The Court: Let me suggest this. Do you wish to introduce those interrogatories and the answers?

Mr. Hon: Not all of them. I only am offering those—

The Court: They are in the record? They are filed?

Mr. Hon: Yes; they are filed in the record, your Honor. I will save the court’s time by stating this, that I wish to introduce—those that have no bearing on the libellant’s case, naturally, I wouldn’t introduce. I understand I am permitted to introduce those I care to introduce.

The Court: You asked the questions?

Mr. Hon: Yes, sir.

The Court: And we have all of the answers?

Mr. Hon: Yes, sir.

The Court: And you wish to use only a part of those answers?

Mr. Hon: I don’t mind using all of them.

(Testimony of David L. Richardson)

The Court: Why not let the questions and answers be considered as having been read?

Mr. Hon: I am in a dilemma to know the proper procedure in that respect, to be frank with you, and the record may so show, whether or not, properly, I should read them into the record or just let that be a part of the record. I don't know.

The Court: Is there any objection to the questions and answers, in so far as both respondents are concerned, being [311] considered as having been read into the record?

Mr. Gallagher: No objection.

Mr. McHose: No objection.

Mr. Hon: The particular ones I will call attention to, on which I will lay stress—

Mr. McHose: Isn't that a matter of argument?

Mr. Hon: For the purpose of the record, as far as Bethlehem Steel is concerned, they will be Special Interrogatories 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

The Court: Do you want to show who those interrogatories were propounded to?

Mr. Hon: To the corporation in and of itself.

(The special interrogatories and answers referred to are as follows:

Interrogatory No. 1. Had a repair crew or any other employees of the Bethlehem Steel Company worked on the S. S. Frank G. Drum on August 6, 1944? If not, when was the last time such persons had worked on the vessel?

Answer No. 1. No. August 5, 1944, about 3:00 p. m.

Interrogatory No. 2. What is the name and last known address of the man in charge of the repair crew on the S. S. Frank G. Drum on August 6, 1944, or the last repair crew to work on the ship, if no repair crew was working on August 6, 1944? [312]

Answer No. 2. Various types of work were in progress, such as welding, riveting, pipefitting, shipfitting, etc. Different men were in charge of each group of repair men.

Interrogatory No. 6. How many men were there in the last repair crew on board the S. S. Frank G. Drum prior to 2100 on August 6, 1944?

Answer No. 6. It is impossible to answer this question. Time records show that approximately 192 men were employed in connection with the repairs being made on August 5, 1944. Some of these men were engaged in work in the shop; others on board the ship. We do not know and cannot determine the exact number on board.

Interrogatory No. 7. Was the nature of the repairs being made on the S. S. Frank G. Drum at the time this accident occurred such that the bunker hatch into which Richardson fell had to be uncovered while the repair crew was actually at work?

Answer No. 7. Yes. The only means of ingress and egress and ventilation to the bunker tank in which plate work was being done.

Interrogatory No. 8. If the answer to the preceding question is "Yes," was there any reason why the bunker hatch could not have been covered or roped off and lighted



or otherwise guarded at the end of the last working day immediately preceding the accident in question?

Answer No. 8. This would be a matter within the control [313] of the Frank G. Drum.

Interrogatory No. 9. Were the members of the repair crew instructed to cover any hatches at the end of the working day, or, if it was decided by the foreman or some other responsible person that a hatch should be left uncovered, what was the repair crew instructed to do to warn others of this condition?

Answer No. 9. No. This also is in the control of the ship.

Interrogatory No. 10. At the time this accident occurred, was there a fixed time of day at which all hatches not being worked in were to be secured?

Answer No. 10. Not to our knowledge.

Interrogatory No. 11. Why was the hatch into which Richardson fell left uncovered on the evening of August 6, 1944?

Answer No. 11. Do not know, as this was within the ship's control. However, it is our understanding it is quite customary to leave hatches uncovered for ventilation or other reasons.

Interrogatory No. 12. Why was the hatch into which Richardson fell unlighted on the evening of August 6, 1944?

Answer No. 12. Do not know, as this was within the ship's control. However, we do not believe it is customary to light the decks of tankers at night. [314]

Interrogatory No. 13. Why was the hatch into which Richardson fell unguarded on the evening of August 6, 1944?

Answer No. 13. Do not know, as this was within the ship's control. However, we do not understand that it is customary to provide guards for such purposes.

Interrogatory No. 14. It has been stipulated that the Bethlehem Steel Company provided electric power for the ship while it was in a repair status. Did the Bethlehem Steel Company have the right to turn on any of the ship's lights that lighted the deck while the vessel was in a repair status?

Answer No. 14. No. Electric power was furnished for ship's use as requested by ship's officers.

Interrogatory No. 15. Did the Bethlehem Steel Company have the right to install and turn on portable or temporary lights to illuminate the deck of the S. S. Frank G. Drum?

Answer No. 15. Yes, but only when and where necessary to proceed with repair work.

Interrogatory No. 16. Did the Bethlehem Steel Company have any extension lights or other suitable lighting equipment that could have been used to light the deck of the S. S. Frank G. Drum on the evening of August 6, 1944?

Answer No. 16. Yes, if required by ship's officers.

Interrogatory No. 17. If the answer to the preceding question is "Yes," would such equipment have been furnished to the S. S. Frank G. Drum upon the request of a proper member of [315] the ship's crew?

Answer No. 17. Yes.

Interrogatory No. 18. Was it the duty of the civilian guards at the entrance to the Bethlehem Yards to keep any unauthorized persons out of the yards?

Answer No. 18. Yes.

Interrogatory No. 19. Was it the duty of Bethlehem's civilian guard to keep any trespassers or other unauthorized persons from boarding the S. S. Frank G. Drum?

Answer No. 19. No. Bethlehem maintained no civilian guard at the ship.

Interrogatory No. 20. If the answer to the preceding question is "Yes," were such guards instructed that Coast Guardsmen with a rating of less than petty officer were not to board any vessel in the repair yard for purposes of inspection unless accompanied by such officer?

Answer No. 20. Do not know.

Interrogatory No. 21. At the time this accident occurred, did the Bethlehem Steel Company know that the Coast Guard would inspect ships tied up at the repair docks?

Answer No. 21. Yes.

Interrogatory No. 22. Did the Bethlehem Steel Company know that in making such inspections, the Coast Guardsmen had the right to inspect the entire vessel from stem to stern?

Answer No. 22. Do not know what right of inspection [316] Coast Guardsmen might have.)

Mr. Hon: In so far as the special interrogatories addressed to the Tide Water Associated Oil Company are concerned, the court's attention will be particularly called to Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 11, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 29, 30, 31, 32 and 33, and the answers thereto.

The Court: It all goes in as part of the record?

Mr. Hon: Yes, your Honor.

(The special interrogatories and the answers referred to are as follows:

Interrogatory No. 1. Were the members of the standby crew employes of and paid by the Tide Water Associated Oil Company?

Answer No. 1. The members of the crew aboard the vessel were there merely as a security watch. These members of the crew were paid by Tide Water Associated Oil Company, a corporation.

Interrogatory No. 2. What is the name, rank or rating at the time of the accident, and last known address of each member of the standby crew?

Answer No. 2. The name, last known address, rank and rating of the members of the security watch aboard at the time of the accident are: Asa H. Humble, 3rd Mate, 3660—47th [317] St., San Diego, California; J. J. Schleef, Chief Engineer, 1275 — 12th Avenue, San Francisco, California; B. Bisnagno, Bos'n, Fort Jones, California.

Interrogatory No. 3. Which of the persons mentioned in question 2 were actually on duty aboard the SS Frank G. Drum at 2100 on August 6, 1944?

Answer No. 3. See answer to number 2.

Interrogatory No. 4. Who was the Captain of the SS Frank G. Drum on August 6, 1944, and what is his last known address?

Answer No. 4. O. Bengston, 1940 Anza Street, San Francisco, California.

Interrogatory No. 5. Who was in command of the SS Frank G. Drum on August 6, 1944?

Answer No. 5. The vessel was withdrawn from navigation.

Interrogatory No. 6. What were the duties of each individual member of the standby crew while the SS Frank G. Drum was at the Bethlehem Steel Company's repair yards?

Answer No. 6. To act as security watch.

Interrogatory No. 7. Were any members of the standby crew to inspect the ship for any reason while it was in a repair status?

Answer No. 7. The vessel had been delivered to the Bethlehem Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same. [318]

Interrogatory No. 8. If the answer to the preceding question is "No," then, who was to inspect the vessel for fire hazards, leaks, sabotage, etc.?

Answer No. 8. There were no fire hazards aboard the vessel. All machinery was shut down. The hull was in good condition.

Interrogatory No. 11. Was the nature of the repairs being made on the SS Frank G. Drum such that the bunker hatch into which Richardson fell had to be uncovered on the evening of August 6, 1944?

Answer No. 11. Employees of the shipyard are the only ones who can tell the nature of repairs or why the bunker hatch was uncovered.

Interrogatory No. 13. Why was the bunker hatch into which Richardson fell open and uncovered at 2100 on August 6, 1944?

Answer No. 13. This question can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of this respondent.

Interrogatory No. 17. Was it customary for the ship's crew to leave a bunker hatch uncovered, unlighted, unguarded, and not roped off at night?

Answer No. 17. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the bunker hatch while the vessel was in the shipyard for inspection and [319] repair.

Interrogatory No. 18. Were there any fixed lights on the SS Frank G. Drum that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell?

Answer No. 18. No.

Interrogatory No. 19. Did the ship have any portable lights that could have been used for this purpose?

Answer No. 19. No.

Interrogatory No. 20. If the answer to the preceding question is "No," were such lights available at the Bethlehem Steel Company's repair yards?

Answer No. 20. This respondent does not know.

Interrogatory No. 21. Where were the members of the standby crew at the time the accident in question occurred?

Answer No. 21. Chief Engineer Schleef was standing on the starboard side of the poop deck. Bos'n Bisango was in the same place. Asa H. Humble, 3rd Mate, was in his quarters.

Interrogatory No. 22. Was there any requirement or regulation in effect on August 6, 1944, that some member



of the ship's crew should be stationed at or near the gang plank at all times?

Answer No. 22. Not that this respondent know of.

Interrogatory No. 23. Was there a member of the ship's crew stationed at or near the gangplank at 2105 on August 6, 1944? [320]

Answer No. 23. No; excepting the two who were on the poop deck.

Interrogatory No. 24. Did the Tide Water Associated Oil Company know that the SS Frank G. Drum would be inspected by the United States Coast Guard while she was tied up at the repair docks?

Answer No. 24. The Tide Water Associated Oil Company knew that the statutes of the United States permitted certain designated persons in the Coast Guard to board the vessel any time such persons were ordered to do so by proper authorities but has no information with reference to when such persons would board the vessel.

Interrogatory No. 25. If the answer to the preceding question is "Yes," did the Tidewater Associated Oil Company know that in making such inspections the Coast Guardsmen making the inspection could inspect the entire ship from stem to stern?

Answer No. 25. Tide Water Associated Oil Company had no power to restrain the Coast Guard from doing anything it undertook but would naturally expect any person to use the usual and ordinary means furnished for moving from one part of the vessel to another.

Interrogatory No. 26. Had the members of the stand-by crew been told that the United States Coast Guard might inspect the SS Frank G. Drum while it was tied up at the repair [321] docks?

Answer No. 26. No member of the security watch has so stated; therefore this respondent does not know.

Interrogatory No. 27. Had the SS Frank G. Drum ever been inspected by any members of the United States Coast Guard during the war prior to this accident?

Answer No. 27. Respondent assumes so but has no actual knowledge thereof.

Interrogatory No. 28. If the answer to the preceding question is "Yes," had these inspections always been made by a Coast Guardsman of at least petty officer rating or by a detail under the immediate command of a Coast Guardsman of such rating?

Answer No. 28. Respondent does not know.

Interrogatory No. 29. Had the members of the ship's crew ever been told that a Coast Guardsman with a rating lower than petty officer was not authorized to board the vessel alone?

Answer No. 29. Respondent does not know.

Interrogatory No. 30. Did the Tide Water Associated Oil Company ever challenge the right of a Coast Guardsman of less than petty officer rating to board the SS Frank G. Drum?

Answer No. 30. Respondent does not know what employees of this respondent may have done.

Interrogatory No. 31. Did the Tide Water Associated Oil [322] Company ever take any steps to keep Coast Guardsmen of less than petty officer rating off the SS Frank G. Drum?

Answer No. 31. Respondent does not know what any employees of respondent may have done in this respect.

Interrogatory No. 32. Did the Tide Water Associated Oil Company ever protest to the Coast Guard authorities about Coast Guardsmen of less than petty officer rating boarding the SS Frank G. Drum unaccompanied by commissioned or petty officers? If so, please give the details.

Answer No. 32. No.

Interrogatory No. 33. Did a member of the ship's crew make a report of this accident to the Tide Water Associated Oil Company? If so, who?

Answer No. 33. The Master.)

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Mr. Hon: It is 11:00 o'clock. Could we have our recess now? I think we are going to rest.

The Court: We will take a recess for 10 minutes.

(Short recess.)

Mr. Hon: Your Honor, with reference to the amendment to the libel, in so far as the fictitious names are concerned, we would like permission to cure that by amending the libel by adding Article Second A. "That at all times herein mentioned John One, John Five and John Six were the agents, servants and/or employees of the respondents, Bethlehem Steel [323] Company, a corporation, and/or Tide Water Associated Oil Company, a corporation, and at all times herein mentioned were acting within the course and scope of their employment and/or agency; that the true names of John One, John Five and John Six are unknown to libelant, and, when he ascertain their true names, he will ask leave of court to amend this libel by inserting their true names at this place."

The Court: Are you attempting to amend to conform to this?

Mr. Hon: At the beginning of the trial when I dismissed as to the Does, you stated I might amend my libel, so that was the purpose of putting that amendment in. It was at your suggestion. I think that the libel was passed upon as being technically correct. At one time there was a demurrer filed and that has been passed upon

by the court and I simply do that because you wanted me to dismiss as to the fictitious parties.

The Court: There is no objection to setting out fictitious servants and agents but, of course, eventually, you would have to connect them up some way, wouldn't you?

Mr. Hon: Eventually, if I ascertain their names during this trial, I would insert the true names.

The Court: It wouldn't do any harm. Is there any objection?

Mr. McHose: The way I understood it, he said these par- [324] ties were employees of both respondents. Did I misunderstand it?

Mr. Hon: Of both respondents; yes.

Mr. McHose: How could somebody be employed by Mr. Gallagher's client and also ours?

Mr. Hon: I put "and/or" in there.

Mr. McHose: We are not making any opposition as far as we are concerned. If there is proof as to some of our employees, we are responsible.

Mr. Hon: Anyhow, the corporation should be responsible without bringing in the employees who did the work. It would be a question of respondeat superior, your Honor.

The Court: There is no objection to the amendment as proposed but write it out and place it in the files.

Mr. Gallagher: May it be deemed denied?

The Court: It may be deemed denied. Is that correct?

Mr. Hon: Oh, yes. The libelant rests.

Mr. McHose: Does your Honor have any particular preference as to how the respondent's testimony should be put on?

The Court: I have no preference as to whichever way you gentlemen determine you would like to put in your defense.

Mr. McHose: Mr. Gallagher suggests we were named first in the libel and perhaps should put it on first. Will you take the stand, Mr. Courtiour? [325]

WILLIAM J. COURTIOUR,

a witness on behalf of the respondent Bethlehem Steel Company, being first duly sworn, testified as follows:

The Clerk: How do you spell your name?

A. C-o-u-r-t-i-o-u-r.

Direct Examination

Q. By Mr. McHose: Mr. Courtiour, are you superintendent of repairs for the Bethlehem Steel Company, shipbuilding division, here in San Pedro?

A. The hull repairs.

Q. The hull repairs? A. Yes, sir.

Q. How long have you been engaged in the ship repair business? A. Over 40 years.

Q. Have you been with the Bethlehem Steel Company for some time? A. 23 years.

Q. And you have been at San Pedro for how long out of that time?

A. All that time with Bethlehem. I was there before, of course.

Q. When you say you are superintendent of hull repairs, that means that you are in charge of repairs to the hull of a ship as distinguished from the engine, is that [326] correct? A. Yes, sir.

Q. Someone else down there is superintendent of engine repairs? A. Yes, sir.

(Testimony of William J. Courtiour)

Q. If a ship comes in and requires plate work to be done, does that come within your jurisdiction?

A. Yes, sir.

Q. You were superintendent of repairs on August 6, 1944, were you? A. Yes, sir.

Q. Do you know the tanker Frank Drum?

A. Yes, sir.

Q. You have done work on that vessel at various times, have you not? A. Yes, sir.

Q. Did she come into your yard for repairs in July, 1944? A. Yes, sir.

Q. Will you tell the court, just roughly, what the repairs consisted of?

A. The hull repairs consisted of damage to the shell and general repairs to bulkheads or decks or hatches, whatever was found necessary.

Q. Did you do quite a bit of work on that vessel? [327]

A. Yes.

Q. How long was she in the yard approximately?

A. She entered the yard, I believe, on July 26th, and left the yard August 18th.

Q. Were you on board her on various occasions during that time? A. Yes, sir.

Q. In connection with the work that you did, Mr. Courtiour, I show you a repair contract, which has been introduced in evidence as Respondent Bethlehem Steel Company's Exhibit D, and ask you if you were superintendent of the hull repair so far as that contract is concerned. A. Yes, sir.

The Court: Is that Exhibit D?

Mr. McHose: Exhibit D.



(Testimony of William J. Courtiour)

Q. Mr. Courtiour, in connection with that contract, did you do some shell plate work in the way of the port bunker tank? A. Yes, sir.

Q. What was that work?

A. The removal of some shell plates and the repairing of same, fairing the same.

Q. What do you mean by the fairing of plates?

A. If a plate is slightly dented, we fair it in places. We do not remove it.

Q. You straighten it out? [328]

A. Yes, sir; we straighten it out.

Q. In order to do that work, Mr. Courtiour, on what part of the ship was it necessary for you to go?

A. On the port side.

Q. Did you have to do any work from the inside?

A. Yes, sir.

Q. In order to do the work which you did from the inside, what part of the ship did you go into?

A. Into the bunker tank.

Q. How did you get into the bunker tank?

A. Through a hatch on the main deck.

Q. Was there any other means of ingress to or egress from that tank? A. No, sir.

Q. Can you identify for us, Mr. Courtiour, the blueprint of the ship here? Do you recognize that as a blueprint of the Frank Drum? A. Yes.

Q. Will you step down and point out to the court the entrance to the bunker tank?

The Court: Is there any difference of opinion on where this work was done?

Mr. McHose: No; I agree with your Honor. This is preliminary and probably not important. It is the point marked "X" there. [329]

(Testimony of William J. Courtiour)

The Court: I think we all agree that that is the place where you have to enter.

Q. By Mr. McHose: And that was the only means by which you could come into the bunker tank to do this work that you had contracted to do? A. Yes, sir.

Q. Before you go into the bunker tank, Mr. Courtiour, is it necessary to do anything with respect to possible gas in a tank?

A. The tank must be cleaned and gas free before we can go in.

Q. Do you know who did your work on this occasion?

A. The California Ship Service Company.

Q. The California Ship Service Company?

A. Yes, sir.

Q. Were they employed by Bethlehem to clean the tank?

A. They were subcontractors; yes, sir.

Q. Do you know whether the ship itself did anything with respect to the gas cleaning?

Mr. Hon: Just a minute, your Honor. As to the answer "subcontractors," I will object to that, in so far as libelant is concerned, as a conclusion of the witness and not binding on the libelant, that the California Ship Service Company did it and were subcontractors. I think that is a conclusion. And, if there is any attempt to say that that particular work [330] or that particular opening was left there through them, then we would have to have the facts or the contract that was made with the California Ship Service Company.

Mr. McHose: Mr. Hon, I think you are borrowing trouble.

Mr. Hon: If I am borrowing trouble, I will withdraw it.

(Testimony of William J. Courtiour)

Mr. McHose: The facts are that the California Ship Service Company was employed by the Bethlehem Steel Company to do this work.

Q. The work is called for by the contract and it is to be responsible? Is that correct, Mr. Courtiour?

A. Yes, sir.

Q. And the California Ship Service Company did the work of cleaning out the tank? A. That is right.

Q. What did they do to clean out the tank?

A. They wiped it down with rags and pulled the sludge out, whatever sludge is in the bottom, with buckets.

Q. Before that is done, is anything done with respect to steaming the tank?

A. The tank must be steamed.

Q. Who does that work?

A. That is usually done by the ship's crew.

Q. Do you know when that was done in this case?

A. That was done, I believe, when she came to the yard.

Q. Then, after she came to the yard, the Cali- [331]  
fornia Ship Service people finished it up?

A. That is right.

Q. Did you obtain a certificate from a chemist that the tank was free of gas and safe to work in?

A. Yes.

Q. Do you know on what date you obtained that certificate? A. August 3rd.

Q. When did you begin work in the tank?

A. It might have been that day or night. It was on or about August 3rd.

Q. Was work done there on August 4th?

A. Yes.

(Testimony of William J. Courtiour)

Q. And was work done there on August 5th?

A. Yes.

Q. Will you tell the court now what your practice is in doing that work, who actually does the work, and who is in charge of it and how it was done?

A. When a ship comes to the yard, a specification is prepared and distributed to the superintendents and the foremen. The foremen then immediately proceed with the work there and, of course, it is the duty of the superintendent to see that the work is started and that it is proceeding satisfactorily every day.

Q. Do you know about how many different gangs [332] were used in this work in the bunker tank?

A. It would take, at the most, four of any one department.

Q. What do you mean by that?

A. The first men that would be necessary after the tank is gas freed would be the men to build the scaffold, that we call the stage builders. That would be four men.

Q. You build a scaffold down inside of the bunker tank?

A. That is right.

Q. In order to do that, do you take tools and materials and things down into the tank?

A. Yes.

Q. How is that done?

A. That is lowered through the hatch.

Q. Do you put up a pulley and line?

A. We may, and, if the crane cannot reach it, we have to put up a gin ball.

Q. Do you know what was done in this case?

A. I think the crane could reach this case and lower it down.

Q. Go on with the names of the different gangs.

(Testimony of William J. Courtiour)

A. After the stage builders are through, then it would necessitate the bolter-ups, which would be two men putting the bolts in the holes after the plate has been removed and [333] replaced, and, after that, the holder-on and the passer when it comes to riveting the plates.

Q. Were these plates riveted or welded?

A. Riveted.

Q. Were there quite a number of men who went down into that bunker tank during the time this work was being done?

A. Not at any one time. The most that would be necessary would be four or five men at any one time.

Q. Different gangs would go down different times?

A. Different times.

Q. And what kind of ships were you working on at that time?

A. Oh, generally, our ships, I believe it was, at that time.

Q. You would have one group of men working 10 hours and then another working 10 hours, and four hours in order to keep working, is that right?

A. That is right except on Saturdays, when we got out at 3:30.

Q. Was the 5th of August, 1944, a Saturday, do you remember?

A. Yes, sir.

Q. Did you quit work at that time?

A. Yes, sir.

Q. When did you resume work? [334]

A. Monday, the 7th.

Q. At what time? A. 7:00 o'clock.

Q. During the time this work was going on, Mr. Courtiour, will you state whether or not it was necessary to leave the bunker hatch cover open?

(Testimony of William J. Courtiour)

A. It was open all the time that the work was going on.

Q. Why was that?

A. To allow men to get in and out and to get material in and out.

Q. Was there any other reason why it was kept open?

A. Well, to keep the tank free. A tank will foul up with foul air unless there is circulation of air.

Q. Unless a tank has been gas freed, is it necessary to keep it open and ventilated until you have finished working there? A. Yes, sir.

Q. Do you know about when you completed the work of the port bunker tank?

A. I couldn't give you the exact date. It would be around the 12th. Pardone me; the tank was busted, which might have thrown it up around the 17th.

Q. You did work in that tank on the Monday after August 5th? A. Yes, sir. [335]

Q. Do you know when the California Ship Service Company workmen first went into the bunker tank?

A. I would say about the 1st. It usually takes them a couple of days to clean a bunker tank.

Q. Do you know when your own workmen first went in there?

A. We wouldn't go in until the gas free certificate was issued, which was the 3rd.

Q. And you worked in there continuously, did you, from that time on until the work was completed?

A. Yes, sir; except over the week-end.

Q. Now, you did stop work, I think you said, at 3:30 on Saturday afternoon? A. Yes, sir.

Q. Do you know whether any work was done on the ship by the shipyard on Sunday, the 6th?

A. Not to my knowledge.



(Testimony of William J. Courtiour)

Q. Do you have any personal knowledge of an accident which occurred at the bunker hatch on Sunday evening the 6th?

A. I heard about it on Monday when I went to the yard.

Q. You know nothing about it other than that?

A. No, sir.

Q. Other than what you heard after you arrived there?

A. That is all. [336]

Q. During the time that the work was going on in the yard, Mr. Courtiour, were representatives of the Associated Oil Company on board the ship?

A. Yes, sir.

Q. Did you see them on various occasions when you boarded the ship?

A. Yes, sir.

Q. Do you know what they were doing on the ship?

A. I couldn't tell you any particular job that they were doing. I would see them around the ship when I went on board.

Q. Did they have anything to do with the repairs that you were making?

A. Sometimes they offered suggestions but they did not do the repairs.

Q. The work was actually done by your men?

A. Yes, sir. Sometimes they worked on their own work, cleaning or painting.

Q. Do you remember how many of them were on the ship at the time?

A. I couldn't tell you the exact number; approximately 12 or 15 men.

Q. Did you see different men at different times?

A. That is right.

(Testimony of William J. Courtiour)

Q. Was there any power on the ship while she was in the [337] yard?

A. Electric power, do you mean?

Q. Well, let me put it this way. Were the ship's engines or auxiliaries operating?

A. Not to my knowledge.

Q. Did the shipyard provide power for the ship?

A. Yes, sir.

Q. Including electric power? A. Yes.

Q. Will you state to the court how that power was provided?

A. A line is connected to the switchboard to furnish lights to the ship's lights, and it also furnished plug boxes so that temporary cords can be plugged into the boxes on the ship wherever the men are working or into the gangway.

Q. You plug into the main ship's line with electric power? A. Yes, sir.

Q. When that is done, how are the lights on the ship turned on and off?

A. If it is in the rooms, of course, it is done by the men occupying the rooms. If it is out on the deck, whoever needs light plugs it into the plug box.

Q. How about the lights on the mast, the regular ship's lights? [338]

A. That would be turned on, of course, by the ship's crew because those are switches.

Q. Those are the same switches that are used when the ship is at sea? A. Yes.

Q. But, in addition to that, you put temporary electric plug boxes at points on the deck?

A. Yes, sir; that is right.

(Testimony of William J. Courtiour)

Q. In order to get a light from one of those, a light is plugged in? A. Correct.

Q. How is that turned on?

A. As soon as it is plugged into the box, it makes contact, that is, with a live plug box.

Q. So that all that is necessary is to plug it into the box and then you get the lights? A. Yes, sir.

Q. And that power is maintained all the time?

A. Yes, sir.

Q. And, to get a light from one of those plug boxes, you have to plug it in right at the box? A. Correct.

Q. You can't turn an individual light off or on from ashore? A. No. [339]

Q. Mr. Courtiour, when your men are using a hatch, such as a bunker hatch, as a door to go into a part of the ship, is there any custom as to what you do when you stop work in that part of the ship?

A. Not in that type of a hatch. Of course, we just come out. It has a raised coaming and we do not do anything there.

Q. Do you leave it open?

A. That is the custom.

Mr. Hon: Just a minute. I object to that statement, that voluntary statement that that is the custom. I don't think that is binding on Richardson. I don't think there is any foundation laid for it.

The Court: It may be a custom and may be today's custom.

Mr. Hon: Your Honor, I will leave it for argument.

Q. By Mr. McHose: When you are using a place like that and you leave it, you leave it open, is that correct?

A. Correct.

(Testimony of William J. Courtiour)

Q. Anyhow, that is your custom, is that it?

A. It is regular marine shipyard practice.

Q. But it is your custom, is that it?

A. Yes, sir; where the hatch is close to the bulkhead, as that one was.

Q. Mr. Courtiour, do they work on board ships at night [340] on occasions? A. They do; yes.

Q. Also during the daytime? A. Correct.

Q. In fact at this time you were working 20 hours out of 24? A. At that time.

Mr. McHose: I think that is all.

Mr. Gallagher: Do you want to examine first?

Mr. Hon: You go ahead.

#### Cross Examination

Q. By Mr. Gallagher: Mr. Courtiour, if you do work at your shipyard and, in the course of the work, you remove safety measures like railings and guards and matters of that kind, is it your custom or the custom of your company, when you finish the job, to just ignore the replacing of the railings and the guards and walk off and leave it?

A. If there is a rail, we put a rope and, if there is a chain, we put the chain back. That is the custom.

Q. In other words, it has been the custom of your company to replace whatever safeguards were present at the time you started your work? A. Yes.

Mr. McHose: When do you mean, Mr. Gallagher?

Q. By Mr. Gallagher: Let me put it this way. Assume [341] you go to work in the morning of a day, and at the time you start work there is an open hatch with ropes to guard it to prevent people from falling into it, and in order to do your work, it is necessary for you to remove

(Testimony of William J. Courtiour)

the ropes and stanchions, when you get through at night. Is it the custom of your company to leave the open hatch there without replacing the guard ropes?

A. If there is a rope there, the men are instructed to replace the rope.

Q. In other words, it is the duty of the men to make a place secure when they leave it at night?

A. If it is unsafe.

Q. In other words, whenever they get through that work, if they are going to be off the ship overnight or over a week-end, your men are instructed to do whatever is necessary to make that place safe?

A. We have safety meetings and we instruct the men to work safely.

Q. And that is their job?

A. Whenever there is a hazard, that they realize or feel is a hazard, that they will try to protect it.

Q. As I understand it, your men are instructed, whenever they leave an open hatch, to rope it off if it is going to be open all night?

A. That is, if the opening is flush with the deck but, [342] if it has a raised coaming, no.

Q. If a hatch has a coaming of eight inches, is it the custom of your company to have its employees leave it overnight without any protection of any kind?

A. That is shipyard practice.

Q. Is that your practice?

A. Yes; where it is alongside a bulkhead, as this was.

Q. Is that your practice, even though the bunker hatch may have been roped off when you first went aboard the ship?

A. I would say, if the bunker hatch was roped off and our men removed the rope, they should put it back.

(Testimony of William J. Courtiour)

Q. Whenever they left the ship, they should put it back? A. Yes, sir.

Q. In other words, if that particular bunker hatch had been roped off when the ship came into the shipyard, then your men were instructed to replace those ropes whenever they would leave the job for overnight or a week-end, is that right?

A. If you mean that they were definitely instructed at that job, I would say no, because —

Q. I mean general instructions.

A. The general instructions are that the men must leave the ship as safe as they can.

Q. As safe as they found it? [343]

A. Well, sometimes a ship may think it is necessary to put a rope around and we may not think it is necessary. Where there is a raised coaming, we don't think it is necessary to put a rope around.

Q. In those cases where you think maybe the ship has taken more precautions than are necessary, you omit those precautions?

A. At times it is done; yes.

Q. Did you go aboard this particular vessel before any work was done at all?

A. I can't remember. I would say no.

Q. So that you do not know of your own knowledge what the condition of this particular bunker hatch was at the time of the start of the work?

A. Other than it was unsafe for men. It had to be cleaned.

Q. It wasn't gas free? A. No.



(Testimony of William J. Courtiour)

Q. But I mean so far as the position of the bunker hatch cover itself and whether it was or was not guarded, you don't have any personal knowledge of that?

A. No.

Mr. Gallagher: I think that is all.

Cross Examination

Q. By Mr. Hon: Mr. Courtiour, at the time you started [344] working there, you knew that this bunker hatch, which was 4-½ feet wide at the top and 6 feet long, was only 2 feet from the port exit of the aft passageway, didn't you? A. Yes, sir.

Q. You noticed there are only two feet from that open doorway, didn't you? A. Yes, sir.

Q. Do you consider it safe practice, from your 40 years' experience in shipyards, to leave an opening, 4-½ feet wide at the top and 6 feet long and 36 feet 7 inches deep, wide open at night time, when it is only 2 feet from a doorway?

A. That leads from a passageway.

Q. Do you consider that safe practice.

A. Well, it is done.

Q. Just a minute. Do you consider that, in your experience, safe practice?

Mr. Gallagher: I think Mr. Hon objected to a question the other day, when somebody asked somebody about what safe practice was.

The Court: You both opened the door and went into the matter fully and I think he may cross examine.

Q. By Mr. Hon: Is that, in your opinion, safe practice? A. It is the practice. [345]

(Testimony of William J. Courtiour)

Q. No, sir; I am not asking you that. As the court said, it might be a bad practice. I want to know, in your opinion, if that is a safe practice to leave that open. Now, get this; a bunker hatch, at the top 4-1/2 feet wide, 6 feet long and 36 feet 7 inches deep and 2 feet from a doorway leading from a passageway where the officers' mess and the petty officers' mess are right by that doorway. Do you consider it safe practice to leave that wide open 2 feet from a doorway? Is that safe practice, sir?

A. It is the custom in our yard. We —

Q. I am not asking you that.

The Court: Let him answer the question.

A. We have the finest record of any shipyard in the United States from the Safety Council.

Mr. Hon: Just a moment. I move that be stricken.

The Court: The reporter can't get this down when you are both talking. You may move to strike whatever you don't like.

Mr. Hon: I move to strike the voluntary statement of the witness about the extraordinary safe practice that this company has a record of.

The Court: That motion is granted.

Mr. Hon: Mr. Reporter, will you read the question, please?

(Question read by the reporter.) [346]

Mr. McHose: I assume, Mr. Hon, that you intend also by that question to assume that the ship is in a shipyard undergoing repairs at the time.

Mr. Hon: Just the way that was. A. Yes.

Q. By Mr. Hon: You consider that safe practice?

A. Yes sir.

(Testimony of William J. Courtiour)

Q. And you consider it safe practice to leave it there and not even be roped off, is that right, sir?

A. Yes, sir; during repairs.

Q. And you consider it safe practice to leave it that way of a night time, too? A. Yes, sir.

Q. And you knew, Mr. Courtiour, when you undertook the work on that ship, members of the United States Coast Guard would inspect that ship at different times, including night time as well as day time, didn't you?

A. I knew that was the custom.

Q. And you knew, sir, that the members of the Coast Guard in inspecting that ship would go all over the entire ship, didn't you? A. Yes.

Q. And you knew, sir, that in inspecting that ship at night time the members of the Coast Guard would be likely to enter or come out of either the port or the starboard [347] passageway, didn't you? A. Yes, sir.

Q. And you knew that, in coming out of the port passageway they might take any course on that ship that they saw fit to take, isn't that right?

A. You can't do that on a ship.

Q. You knew that they had a right to inspect any portion of that ship, didn't you?

A. I thought they were equipped with flashlights.

Q. Never mind that. You knew they had a right to inspect the entire ship, didn't you, sir?

A. Surely.

Q. And, with that knowledge, you say that, even two feet from that port passageway, it was safe practice to leave that open, is that right, sir? A. Yes, sir.

Q. Why do you say that you left that open?

A. To allow men to go up and down and circulation of air.

(Testimony of William J. Courtiour)

Q. It was primarily to allow men to go up and down or circulation of air, to allow circulation, is that right?

A. Circulation of air, I would say first, and then to allow men to go up and down.

Q. And, when you quit work at 3:30 Saturday, you knew you would have no men working on that ship until the following [348] Monday morning didn't you?

A. Yes.

Q. So you didn't expect your men to go up and down that bunker hatch between 3:30 o'clock on Saturday afternoon, August 5 1944, and Monday morning, August 7th, did you?

A. Correct.

Q. So, in leaving it open, your purpose was to allow circulation, is that right?

A. Yes.

Q. In your opinion, sir, then, when you quit work, was it necessary to have it wide open absolutely to get circulation?

A. You get some circulation that way.

Q. But it wasn't necessary, after it had been gas freed, to leave it absolutely wide open, was it?

A. Not absolutely; no, sir.

Q. You knew that this cover to the bunker hatch had what we call a stiff leg, didn't you, sir; that you could leave that bunker hatch at about a 45-degree angle?

Mr. McHose: Wait a minute, Mr. Hon. That photograph there has not been introduced in evidence. You can use the other one if you want to.

Mr. Hon: I will get it another way.

Q. I am going to show you a photograph here and I am going to ask you if that fairly represents the cover to that [349] bunker hatch that you were working on.

A. Yes, sir.

(Testimony of William J. Courtiour)

Mr. McHose: Your Honor, my point on that photograph —

Mr. Hon: I am not offering it, Mr. McHose. I am merely showing this for another purpose. I am merely showing this witness what has been offered as Tide Water Oil Company's Exhibit E for identification.

Q. That fairly represents, I believe you said, the bunker hatch cover, doesn't it?

A. That does.

Q. So, Mr. Courtiour, there is no question in your mind, sir, but what that bunker cover could have been left in the position that it is now shown in this exhibit and you would have had sufficient circulation here?

A. Yes; that would have given sufficient circulation of air.

Q. That would be quite sufficient circulation of air, wouldn't it?

A. Yes, sir.

Mr. Hon: Now, your Honor, I will have to offer this as the Libelant's next succeeding exhibit, merely to show that this represents the way the bunker hatch appeared to this particular witness, and that in the position it is shown in this picture that would have been sufficient for the purpose for which they left it open on August 5, 1944, at 3:30 o'clock. [350] I offer it for that purpose and that purpose only.

Mr. McHose: I don't want to be difficult about this exhibit but, when Mr. Gallagher brought it up yesterday —

The Court: Of course, that is more or less a matter of argument, too. If it fairly represents the appearance of that —

(Testimony of William J. Courtiour)

Mr. McHose: The point of my objection goes to two things; first, that it does not represent the hatch as it was at the time of the accident because it is on the stiff leg and not back; and, secondly, somebody has doctored it up with a lot of ropes, which is something that didn't exist at the time of the accident. Of course, the law is well established that a photograph cannot be introduced to show the way a premises should be, on the theory of one of the parties to the litigation, by changing it around from what it was. But this is an admiralty action and we haven't a jury and I am not going to make a point —

The Court: The court will disregard in that photograph every consideration referred to except the position of that cover and the sustaining upright.

Mr. McHose: I think we can all agree, if it had been on the stiff leg, there wouldn't have been as much danger of someone falling in it.

The Court: It may be received for that purpose.

The Clerk: Libellant's Exhibit 7 in evidence. [351]

Mr. Hon: That is all I have. I have no further questions.

#### Recross Examination

Q. By Mr. Gallagher: Mr. Courtiour, did you anticipate that members of the Coast Guard or anybody else who might board that particular ship would be walking around in the vicinity of that bunker hatch cover at night, when that particular ship was dark?

A. I didn't anticipate that they would be, Mr. Gallagher.

Q. Do you think it would be safe practice for a Coast Guardsman, in making an inspection, to go into a lighted passageway, like this starboard passageway, walk around



(Testimony of William J. Courtiour)

in bright light through the starboard passageway, and then just pull a curtain aside and step out onto that deck of the tanker, let the flap close behind him, and then take a step, without attempting to see where he was going or what he was going to step on?

Mr. Hon: Just a minute. That is a long question. I would like to have it again before it is answered.

The Court: I think we will take a recess during the noon hour. It is after 12:00 and that matter can be renewed after lunch. We will take a recess until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock of the same day.) [352]

Los Angeles, California, February 13, 1947, 2:00 o'clock  
p. m.

The Court: You may proceed.

WILLIAM J. COURTIOUR,

the witness on the stand at the time of recess, being previously duly sworn, resumed the stand and testified further as follows:

Recross Examination (Resumed)

Q. By Mr. Gallagher: Mr. Courtiour, this morning you were asked by Mr. Hon whether it was safe practice to leave the bunker hatch open and you said you thought it was.

Mr. McHose: Mr. Gallagher, I think you have a question pending.

Mr. Gallagher: That is right; I have a question that is unanswered. May I have that read?

(Testimony of William J. Courtiour)

(Question read by the reporter.)

Mr. Hon: I don't believe that you have correctly cited the conditions, first. I think that the testimony shows that he pulled back the curtain, put his left foot out and then brought his right foot out and took a step and went down.

The Court: Just a moment. Is this man testifying as an expert? Are you asking a hypothetical question?

Mr. Gallagher: I am cross examining him along the same lines Mr. Hon did.

The Court: I know, but he can't give any opinions unless [353] he is testifying as an expert.

Mr. Gallagher: I don't think that he is expert.

The Court: I doubt whether the form of the question is proper in the way in which you put it, calling for a man's opinion and conclusion. That is for the court to determine.

Q. By Mr. Gallagher: Mr. Courtiour, you did express an opinion that it was safe practice to leave this bunker hatch open while the ship was in the yard undergoing repair but I don't recall whether you gave any reasons for that opinion. What reasons do you have to back up that opinion?

A. In view of the fact that it has got a coaming around the opening.

Q. What has that got to do with it?

A. The man would have to step over 8 inches to step into the hatch.

Q. And that would be higher than the usual height above the surface that a man would raise his foot in taking an ordinary step? A. Yes.

(Testimony of William J. Courtiour)

Q. Mr. Courtiour, I want to show you two photographs and ask you whether the first is a correct representation of the port side of the main deck of the Drum forward of the opening out of which this young man said he came.

A. Yes, sir.

Q. That shows the catwalk, which is more towards the [354] starboard than towards the port, and ladders going up to the catwalk?

A. That is correct.

Mr. Hon: I never did see that catwalk, Mr. Gallagher.

Mr. McHose: I don't think that photograph has been marked yet.

Mr. Gallagher: No. I am going to offer it in evidence now.

The Clerk: Is this offered jointly?

Mr. Gallagher: It doesn't make any difference to me.

Mr. McHose: It can go in jointly.

The Court: Who is offering it?

Mr. Gallagher: I am offering it.

The Court: Is there any objection?

Mr. Hon: No.

The Court: It may be received and marked.

Mr. Hon: I don't know anything about the picture.

Mr. Gallagher: The witness said it was a picture of it.

The Clerk: Respondent's Exhibit F.

Q. By Mr. Gallagher: Mr. Courtiour, I show you another photograph and ask you if that is a representation of the bunker tank looking down into it from the deck.

A. Yes, sir.

Q. And, as you look at the photograph with the date "3-8-46" at the bottom of the photograph, can you tell

(Testimony of William J. Courtiour)

us [355] whether the small beam that appears on the left-hand side of the bunker hatch is closest to the port side or closest to starboard?

A. Yes, sir; the port side of the hatch.

Mr. Gallagher: May I write that on this photograph, your Honor, "starboard," so that it will appear in the record — or "port," I mean?

Mr. Hon: What is it you want to write?

Mr. Gallagher: This is the port side.

Mr. Hon: Well, write "port" out here.

Mr. Gallagher: All right; "port" out here.

Q. By Mr. McHose: That photograph is taken looking directly down on the hatch, is that it, Mr. Courtiour?

A. Yes. Here is the hatch cover against the bulkhead. The doorway would be here.

Mr. Gallagher: I will offer that photograph as Respondents' exhibit next in order.

The Court: It may be received.

The Clerk: Respondents' Exhibit G.

Q. By Mr. Gallagher: Mr. Courtiour, when work was being done at night by the shipyard crew, did you have a yard electrician who would come over and place the lights that were required by the workmen employed by Bethlehem?

A. Just what we call the temporary light man.

Q. And those lights would be attached to cords [356] and would be placed wherever it was necessary to have them?

A. Yes, sir.

Q. And those, of course, are illuminated by power from shore?

A. Yes, sir.

Q. You would just have your temporary light man bring on his portable boxes or connections and put them

(Testimony of William J. Courtiour)

wherever they were required and then insert the light plug cord in that?      A. Yes, sir.

Q. Mr. Courtiour, who would be the one to give orders to the employees of the shipyard with reference to the work that they did on the ship?

A. Will you state that question again?

Q. Who would give orders to the shipyard employees with reference to everything that the shipyard employees would do aboard the ship?

A. The employees' immediate boss did. In some cases the men, or in most cases, the men have a leading man. There is a leading man for about every 10 men and above him a foreman.

Q. So that any work that was done by members of the staff of Bethlehem or the employees of Bethlehem would be done pursuant to orders received from someone immediately superior to them in the employ of Bethlehem, of the Bethlehem Steel [357] Corporation?

A. Not always. Sometimes men take responsibility themselves. They are not told every move to make.

Q. What I mean is this. When work is being done on a ship, the ship's crew doesn't give orders to your employees?

A. They will ask sometimes that things be done.

Q. I mean they won't say, "You do this," and "You do that"?      A. Yes.

Q. They may make requests, is that right?

A. Yes, sir.

Q. Who was the superior of this temporary light man?

A. The foreman electrician.

Q. And the foreman electrician was an employee of Bethlehem?      A. Yes, sir.

(Testimony of William J. Courtiour)

Q. And who would be the employees of Bethlehem who would rope off places that might appear to be dangerous, in the event they were to be roped off by employees of Bethlehem?

A. Usually the stage rigging department.

Q. And who is in charge of that department?

A. That department comes under the shipwright foreman.

Q. You don't know of your own knowledge what, if any, employees of Bethlehem came aboard this vessel within a half an hour after the accident happened, do you? [358]

A. Not to my knowledge.

Q. You can't say whether any did and neither can you can that no one did?

A. No, sir.

Q. You said something this morning about the fact that this particular bunker hatch was right close to a bulkhead and that that had something to do with your opinion that it was safe practice to leave this particular bunker tank open. Will you tell us just what connection the proximity of the bunker tank to the bulkhead had, in your opinion?

A. The after part of the hatch was right close to the bulkhead, within, I would say, six inches.

Q. That is, when the bunker tank cover was leaned back, it was right up against the bulkhead?

A. Correct.

Q. So that, if any man walked close to the bulkhead, he would come in contact with that tank top?

A. Sure.

Q. Mr. Courtiour, you have been in that ship repair business, you say, for about 40 years and 23 of those years have been spent with Bethlehem, is that right?

A. Yes, sir.



(Testimony of William J. Courtiour)

Q. So that you have had an opportunity to see hundreds and hundreds of oceangoing vessels?

A. Yes, sir. [359]

Q. Isn't it true, in all your experience, you have never seen fire extinguishers placed outside, where they would be exposed to weather?

A. I can't remember seeing any on the outside.

Q. These fire extinguishers that are carried by ocean-going vessels, the portable type, I mean, are always kept inside so that they won't corrode or be exposed to water or fog or other deteriorating agents, isn't that true?

A. That is true.

Mr. Hon: Is this within the scope of the cross examination or is this Mr. Gallagher's witness at this time?

Mr. Gallagher: That was the only question I wanted to ask about that.

Mr. Hon: I don't think it is within the scope of the cross.

The Court: I don't think it is.

Mr. Gallagher: Well, I will make him my own witness for the one question.

#### Recross Examination

Q. By Mr. Hon: Mr. Courtiour, your answer is about those fire extinguishers, whether or not you remember seeing any — your answer is that you just don't know?

A. There is none to my knowledge.

Q. You didn't see whether there was or wasn't isn't that right? [360]

A. There was none on the outside.

Q. But on tank ships in general, you just wouldn't say you know about this, would you?

(Testimony of William J. Courtiour)

Q. On this one there weren't any but other tank ships might have had them in that place, isn't that right?

A. The hundreds I have had experience on board with I haven't seen any on the outside. There is always a fire hose and a fire connection on the outside.

Q. In other words, as a general rule, on that aft bulkhead, where it meets 'midship, you have seen fire hose on occasions there, is that right? A. Yes, sir.

Q. But not extinguishers? A. No, sir.

Q. And the fire hose is considered as a part of the fire apparatus of the ship? That is part of your fire apparatus, isn't it?

A. Fire protection.

Q. One other question. I am going to at this time refer to Respondents' Exhibit C and, particularly, I am going to refer to what they call the coaming at the threshold of the doorway on the port side. What I am referring to is this coaming right here at the threshold of this port doorway. Do you see it?

A. Yes, sir. [361]

Q. How high is that coaming?

A. It must be 18 inches, according to law.

Q. It has to be 18 inches according to law?

A. Yes.

Q. And your best opinion is that that is 18 inches, is that right? A. Yes, sir.

Q. You never measured this coaming of the bunker hatch in question when the lid was up, did you?

A. I don't think I put my rule to it. I have put hundreds down.

Q. You would say that is about four or five inches, wouldn't you?

A. No, sir; that is 8 inches at least.

(Testimony of William J. Courtiour)

Q. And you are sure that the coaming at the doorway is at least 18 inches, sir?

A. Yes, sir. That is the law, because of water.

Mr. Hon: All right, sir. Thank you.

Redirect Examination

Q. By Mr. McHose: I have one or two other questions. Referring to Respondents' Exhibit F, Mr. Courtiour, will you tell us what this object is immediately below the ventilator to which I am pointing? That is a ventilator, is it not?

A. Yes, sir.

Q. And what is this little place here? [362]

A. That is the entrance to the pump room.

Q. Will you point that out to us on the blueprint?

A. Right here.

Q. It is marked here on the chart "Pump Room Entrance"?

A. Yes, sir.

Q. And there is also marked on here "24-inch ventilator"?

A. Yes, sir.

The Court: Where is that point?

Mr. McHose: This point right here, just immediately forward of the bunker hatch we have been talking about.

Q. Mr. Hon has asked what that is and I will ask you to tell the court what the entrance to the pump room is.

A. The pumps for pumping the cargo out of the ship are down in that compartment.

Q. In order to get to the pumps, you enter the pump room and go down the ladder, is that right?

A. Correct.

Q. Now I want you to look for a moment at Respondents' Exhibit A and I point to a large pipe running across deck approximately 'midships. Can you tell us what that is?

(Testimony of William J. Courtiour)

A. I would say that was the discharge line.

Q. Would you be able to estimate about what size that pipe is?

A. About 12 inches. It is either 10 or 12 inches. [363]

Q. And that runs up here and down the deck, does it, Mr. Courtiour?

A. Yes, sir; and comes up over the stern.

Q. Immediately forward above the bunker hatch — it doesn't show quite as well in this photograph as in some of the others. I am now showing you Joint Exhibits C and A. Is this a pipe that is immediately in front of the bunker hatch? A. Yes, sir.

Q. And what size of pipe is that?

A. It looks to be about a 6- or 8-inch pipe.

Q. And what is this object, which looks like a wheel, which also is immediately in front of that forward port corner of the bunker hatch?

A. This is the bow and that is the hand wheel for opening and closing the valve.

Q. And about how high above the deck does that wheel stand?

A. The top of the wheel I should imagine was about 2 feet 6.

Q. This large discharge pipe is also raised above the level of the deck, is it not?

A. It is raised above to clear this pipe.

Q. So that the pipe we have been talking about, the 6-inch pipe, runs underneath the 12-inch pipe?

A. That is right. [364]

Q. Looking for a moment at Exhibit G, I would like to ask you if you will tell the court what these two longitudinal parts are that show in that photograph.

A. They are known to us as deck longitudinals.

(Testimony of William J. Courtiour)

Q. Those are made out of steel, are they?

A. Yes.

Q. And are they in the form of I beams or something of that sort?

A. Sometimes a channel and sometimes a bulb angle.

Q. Can you tell by looking at those what they are?

A. I can only see one flange. That is the top flange. If it has a similar flange underneath, it may be a channel or may be a bulb.

Q. Perhaps we can tell that in one of the other photographs. Perhaps you can tell that from Exhibit C.

A. It is either a bulb or a channel but it looks to me to be a flange right there.

Q. In any event, it is a solid beam that goes across the bunker hatch opening?

A. That is right. It cuts the hatch opening into three parts there.

Q. And it is at a level with the deck, is it?

A. Correct, right under the deck.

Q. Looking at Exhibit G, and I am pointing to an object in the center of the picture, will you tell us what that [365] is?

A. That is the ladder for going down into the tank and for getting out of the tank.

Q. So that someone who wants to go down into that tank — perhaps, if I turn this around this way, it would look better. This is the bulkhead, isn't it?

A. Yes, sir.

Q. Someone who wants to go down into that tank would step over the pipe here?

A. That is right.

Q. And then go down this ladder, is that correct?

A. Correct.

(Testimony of William J. Courtiour)

Q. Does that ladder go down straight or does it slant?

A. It slants.

Q. Mr. Gallagher asked you a couple of questions about the lights on the ship, Mr. Courtiour. At night, when someone wants a light on the ship other than — or I will ask you this. If someone wants to turn a light on on a ship, one of the ordinary ship's lights, what do they do?

A. The ordinary ships —

The Court: That was covered on his earlier examination. He said they just push a switch in the cabin, if that happens to be where they are.

A. That is correct if they are working in that compartment. [366]

Q. By Mr. McHose: In other words, all the light switches are working while the ship is in the yard, just as they would be working if the ship was out at sea?

A. Yes.

Q. And, to turn them on, you would just turn the switch?

A. Yes.

Q. In addition to that, as I understand it, to assist in doing repair work, you have temporary sockets?

A. Yes.

Q. And, in order to get a light from those, someone needs to take a light and plug it in?

A. That is right.

Q. Are lights provided and put on the ship which can be used for that purpose?

A. Yes.

Q. Anyone there who wanted a light would merely need to plug one of these in, is that it?

A. Yes. If one wasn't sure, he would send for the temporary light man, who would.

Q. If one of the ship's officers wanted a light and there wasn't one on the ship, what would he do?



(Testimony of William J. Courtiour)

A. They might ask the temporary light man to accommodate them but they perhaps would get one of their own. They have their own lights and reflectors. [367]

Q. That is, if they wanted one from the yard, they would ask the temporary light man to get one?

A. That is right.

Mr. McHose: That is all.

#### Recross Examination

Q. By Mr. Gallagher: You don't know what lighting equipment was aboard this particular ship on August 6, 1944, of your own personal knowledge, do you?

A. Only what was left in place when the men left it on Saturday.

Q. That is, the workmen from the Bethlehem Steel Company left certain lighting equipment there on Saturday?

A. Sure.

Q. And what was that equipment?

A. It would be temporary lights in the vicinity where they were working.

Q. Where were you or were you there at the time they quit?

A. I was in the yard. I was not aboard the ship.

Q. Did you go aboard the ship at any time on Saturday, August 5th?

A. I can't remember, Mr. Gallagher.

Q. So that, of your own personal knowledge, you don't know what was being used on Saturday or what was actually left there on Saturday, do you? [368]

A. I know it is the practice — or I know that the lights that they would use, according to shipyard practice, would be left when they left the job.

(Testimony of William J. Courtiour)

Q. They wouldn't be using any of the lights in the daytime on the outside of the ship, would they?

A. No, sir.

Q. They would be using lights inside of the bunker tank and other enclosed spaces?

A. Yes, sir.

Q. And those were the lights you referred to as being left there?

A. Yes, sir.

Mr. Gallagher: That is all.

Mr. McHose: Now —

The Court: How many times are we going back and forth on this?

Mr. McHose: That is all, your Honor.

The Court: Are there any further questions?

Mr. Hon: No; I have no questions.

Mr. Gallagher: Do I understand you have finished?

Mr. McHose: Yes; I am through.

Mr. Gallagher: Mr. Schleef.

J. J. SCHLEEF,

a witness for the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:[369]

The Clerk: What is your name?

The Witness: J. J. Schleef.

Direct Examination

Q. By Mr. Gallagher: Mr. Schleef, where do you live?

A. In San Francisco.

Q. What is your occupation?

A. Chief engineer with the Tide Water Associated.

Q. How long have you been a chief engineer?

A. I would say about 15 years.

(Testimony of J. J. Schleef)

Q. How long have you been employed by Tide Water Associated Oil Company?

A. Nearly 24 years.

Q. Have you had any experience on the Frank Drum?

A. Quite a few years; about 14 years altogether.

Q. You were chief engineer on the Frank G. Drum at the time this young man was involved in an accident at the Bethlehem Steel Company dock?

A. Yes; I was

Q. Mr. Schleef, were you familiar with the general fire fighting equipment on that vessel?

A. Well, pretty much.

Q. Particularly, I would like to have you take a look at Respondents' Exhibit A, which shows the bulkhead immediately after the bunker tank that we are talking about, and I will ask you if there was ever any hydrant on that bulkhead. [370] A. No; never.

Q. That includes the top of it?

A. The top of it. The first hydrant on the main deck is forward of the pump room. The one aft is in the alleyway.

Q. So that there was no hydrant or hose anywhere along this bulkhead?

A. No, sir; not in that vicinity.

Q. When you say there was no fire hydrant in the vicinity, or when you say not in that vicinity, do you mean that there was a fire hydrant attached to that bulkhead or on that bulkhead? A. No; none.

Q. Where was the closest fire hydrant to that bulkhead?

A. Well, it was about 5 feet forward of the pump room scuttle, I would say, about 5 or 6 feet. That is the nearest one.

(Testimony of J. J. Schleef)

Q. When you say pump room scuttle, will you come and show us on this diagram where the pump room scuttle is?

A. That is this way. Of course, you could call it the pump room hose but the proper term is the pump room scuttle. And this is the port and that the starboard.

Q. When you say this hydrant was about 4 feet, forward of the pump room scuttle, you mean forward of the pump room? [371]

A. Yes.

Q. About in here?

A. Somewhere right in here.

Mr. Gallagher: May we mark that, where he says "in here," your Honor?

Q. By Mr. McHose: Was that right on the main deck?

A. Right on the main deck. That is the nearest one.

Q. Is that about right under the catwalk?

A. It is right underneath the catwalk, to the starboard side. It is right in line, I would say, with the frame —

Mr. Gallagher: I have marked "X-S" with this witness, the first letter of his last name.

The Court: Very well.

Q. By Mr. Gallagher: Mr. Schleef, with reference to portable fire extinguishers, were there any of those out exposed to the weather of the Frank Drum?

A. There are no fire extinguishers belonging to the ship on any weather decks or outside. They are all in the alleyways, around the quarters, top and bottom alleyways, the 'midship house and under the forecastle head and none on what we call the weather deck at the time.

(Testimony of J. J. Schleef)

Q. None in any place where they would be exposed to any sea or fog or anything of that kind?

A. None at all. The only reason they don't have them [372] out there is they may get washed overboard.

Q. Mr. Schleef, were you aboard the Frank G. Drum at it was coming into port for the purpose of annual inspection and repairs that year? A. Yes, sir.

Q. And do you have any personal knowledge with reference to anything that was done to the port bunker hatch before the ship was brought into the Bethlehem Steel Company yards for repairs?

A. Well, it was opened for the purpose of gas freeing it after we got through butterworthing it. As a matter of fact, we had to open the hatch to butterworth it.

Mr. McHose: To do what?

A. That is a seafaring term. Butterworthing means this, a machine for cleaning the tanks with steam and water.

Q. By Mr. Gallagher: And the function of that machine is to aid in cleaning the walls of the tank?

A. The oil off of the walls.

Q. You call them bulkheads, don't you?

A. Bulkheads. We don't use "walls."

Q. And, when that was done, was the vessel at sea?

A. At sea.

Q. And, when that work was completed, as far as the cargo of the Frank G. Drum would permit, in what position was the tank cover left? [373]

A. It was left on what was known as the support, that iron bar there, in about a 45-degree angle.

Q. Was there any object placed around the tank?

A. There was a rope put around there. We put them around all open tanks.

(Testimony of J. J. Schleef)

Q. We are talking about this one now.

A. This one had a rope because we didn't have chains for it.

Q. Was that the condition of the tank of the ship at the time the ship was brought in and docked there at the Bethlehem Steel Company yard?      A. Yes; it was.

Q. Was it felt in that condition up to the time Bethlehem started to do this work?

A. Until we went in to clean the tank, when they raised it.

Mr. McHose: I would like to take the witness for a couple of questions.

The Court: You may cross examine later.

Q. By Mr. Gallagher: I will show you Respondents' Exhibit E and ask you if that photograph is a fair representation of the manner in which the port bunker tank was fixed and secured and guarded at the time the ship was brought in there for repairs.

Mr. McHose: I think this is objectionable, as I said [374] this morning, this being a matter before he was injured. I will let him ask the questions but I would like to make it clear that this picture was taken after the accident happened and, as a matter of fact, somebody put that rope around there.

Mr. Gallagher: That is right. I haven't contended or mentioned at any time that that picture was taken before the accident.

Mr. McHose: Ordinarily, that is not admissible but, in view of the situation here, I will let it go in.

The Court: It merely illustrates a condition?

Mr. Gallagher: Yes, your Honor. I will ask Mr. Schleef that direct question.



(Testimony of J. J. Schleef)

Q. Mr. Schleef, does that photograph indicate the condition or the approximate condition in which the bunker tank hatch and the ropes and the stiff leg were at the time this ship was brought in and the shipyard commenced to make these repairs and do this work?

A. It was on the support the way it is here and it also had a rope, but it was not quite as much at that. It was put in more of a seaman-like manner because a sailor put it on there. It had a rope there and leading to the bulkhead. It has just one single line around.

Mr. McHose: That is just the reason why such pictures are not admissible in evidence ordinarily. Did it have a rope around it? [375]

Q. By Mr. Gallagher: It did have a rope around it?

A. It did have a rope around it.

Q. Was the rope which was actually in place at the time the ship was brought in there to the Bethlehem Steel Company's repair dock an effective guard around that opening?

A. Well, if you had stumbled or anything, you couldn't have fell in there for it had something to grab hold of. You couldn't get near the opening of the hatch.

Q. Mr. Schleef, with reference to the lighting conditions on the ship, under whose control were they?

A. That was entirely with the shipyard, the Bethlehem Steel in this case.

Mr. McHose: I object to that question as calling for the opinion and conclusion of this witness and I move that the answer be stricken out.

The Court: Will you read the question?

(Question read.)

(Testimony of J. J. Schleef)

The Court: The answer may be stricken for the purpose of your objection. I think your question is objectionable in this form.

Mr. Gallagher: It probably is, your Honor.

Q. Mr. Schleef, will you tell the court what the condition of the ship was from the time that it was delivered to that yard, with reference to power and machinery and all that sort of thing? [376]

A. Up to the time it was delivered to the yard?

Q. No; after it was delivered to the yard.

A. Well, within 24 hours after, or I would say about that, because it takes about that long to kill the boilers, we are supplied with air, water, lights and everything from ashore. We have no power furnished by the vessel.

Q. Tell the court how you are furnished power from ashore.

A. Well, the yard furnishes — or in what particular? Do you mean the lights and the water?

Q. The lights.

A. They hook up a set of wires to our main switchboard. That is for the ship's lights and for our different circuits, for the rooms, lights in the mast, deck lights or anything, and those that we have in the alleyways. They have another set of temporary wires that the yard furnishes from their connection on the dock, and they string wires along fore and aft of the catwalk and to different places with plug-in boxes, in order to plug in temporary lights, and even down below in the engine room — the extra lights they need, they furnish those wires and power for them.

Q. So far as actually turning a light on is concerned inside the covered portion of the ship, for instance, all you have to do is push a switch?

(Testimony of J. J. Schleef)

A. In each individual room or, if you want to cut out [377] a whole circuit, you would have to go down to the switchboard and pull a switch.

Q. On this particular tanker — will you take that photograph Respondents' Exhibit F and tell the Judge just where lights, which are permanently attached to the ship, are located out there on deck?

A. Well, the only lights we would have, which doesn't take it in here, are up in this mast, is what we call cargo lights, four lights. Then on the house, inside of the alley-way, there are no lights permanently located.

Q. And any other part of the ship?

A. Yes, sir; out on deck here and even inside of the pump room — the only outside lights there are are the mast lights. That photograph doesn't take in those cargo lights up in the mast. They are about 30 feet, I would say, from the deck.

Q. Then, there were no permanent light fixtures, which belonged to the ship, which could have been used to illuminate this bunker hatch?

A. There are no lights in that forward bulkhead; no.

Q. You would have to have some kind of a temporary light?

A. Temporary lights would have to be put there.

Q. A portable light?

A. A portable light. [378]

Q. Mr. Schleef, were you aboard the vessel the night when this young man was injured?      A. Yes; I was.

Q. And where were you?

A. I was walking back and forth on the main deck — or not the main deck but the poop deck forward of my quarters, which is on the starboard side.

(Testimony of J. J. Schleef)

Q. Were your quarters up above the main deck?

A. Yes; they are up one deck higher.

Q. Were they in the after part of the ship or 'midship?

A. The after part.

Q. That is the poop deck?

A. That is the poop deck.

Q. And, from that place, could you see down on the engine room grating?

A. Well, I would have to go into the engine room door. There is a door leading between my quarters and the engine room and I would have to go back through the engine room door to look down.

Q. Was anybody with you that night?

A. The boatswain that was on the ship, whose name I don't remember, was walking back and forth with me. We were getting a little fresh air.

Q. Was that Basango?

A. I think that was his name. [379]

Q. From the place where you were walking up and down, could you see this young man come aboard the ship?

A. I happened to see him come aboard and I saw him crossing the top engine room grating at the time, because I had gone into the engine room to tell the oiler on watch to see that the boilers were dry and to pump them if they were not, and to turn in, and that is when I saw him going from the starboard side to port, and he went out the port alleyway. That is the engine room door. That would be on the main deck.

Mr. McHose: May I have that answer read?

(Answer read by reporter.)

(Testimony of J. J. Schleef)

Q. By Mr. Gallagher: Do you mean that you saw him come out of the port passageway and step out onto the deck?

A. Oh, no. This is from the engine room top grating, the door leading into the port alleyway, which would be about 40 or 50 feet from the door.

Q. At that time, Mr. Schleef, did you have any actual knowledge, any personal knowledge, of the fact that this bunker hatch was open? A. No; I didn't.

Q. Had you observed the shipyard workers around that bunker hatch from time to time in the daytime while they were working?

A. Well, yes, because I am more or less all over [380] the ship at different times.

Q. During the daytime, while they were working, and when you had an opportunity to observe them, did you see that this tank top was open?

A. Oh, yes; it was open.

Q. What were they doing around there when you observed them?

A. Well, when they first started, they had —

Mr. McHose: When you say "tank top," I assume you mean bunker hatch.

Mr. Gallagher: Bunker hatch.

A. Yes; the bunker hatch. They had a cleaning gang cleaning the muck out and, after that, the riggers, or I guess they call them riggers, the stage riggers, lowered their planks to build staging, but I didn't go into the tank myself. But I saw them from time to time working there and that was about three or four days before this accident occurred.

(Testimony of J. J. Schleef)

Q. They would have to open the bunker hatch in order to get this timber down in there?

A. Yes; to lower it. They probably lowered it with one of their own cranes and they would have to raise the hatch in order to lower the planks.

Q. Did you ever observe that bunker hatch open at any time? [381]

A. Well, no; I didn't because I wouldn't have an occasion to go around there. The men worked up till 3:00 o'clock in the morning and, at 4:00 o'clock in the afternoon, I got through with my day's work and I wouldn't be around there.

Q. That is, they were working day shift and night shift?

A. Yes; they worked about 18 or 20 hours a day straight through.

Q. When you say "they" were working there, you refer to the employees of the shipyard?

A. Of the shipyard.

Q. On August 6, 1944, did you hear any cries for help or whistling or anything of that kind?

A. Yes; shortly after I got back on deck, we heard somebody yelling, and we thought it was somebody fell over the side. There was a Navy tender laying alongside, and I thought maybe somebody fell over the side. But it was the boatswain who heard the noise in the tank. The voice then hollered and then he hollered for help. And then we looked in a different direction.

Q. Did you go over to this port bunker hatch?

A. Yes; we went then and helped the boy out.

Q. At the time you got there, was that bunker hatch open?

A. Wide open. [382]



(Testimony of J. J. Schleef)

Q. Up against the bulkhead?

A. Up against the bulkhead.

Q. Were they any lights there? A. No lights.

Q. Were there any ropes around it?

A. No ropes.

The Court: May I ask a question at this point? Let me have the photographs that show those ladders across that opening. This is the opening you referred to, is it?

Mr. Gallagher: Yes, your Honor.

The Court: I want to find out if those ladders were across that opening at that time.

A. Yes; ever since the ship has been built and they are there yet.

Q. By Mr. McHose: A permanent structure?

A. Yes; that is, the longitudinals underneath the deck.

The Court: How much space is there between the edge of the opening and the ladders there?

A. Well, I think they run about 24-inch centers and maybe 28 — I wouldn't say for sure. That is pretty close.

Q. By Mr. Gallagher: The one on the port side is closer to the hatch coaming than the one on the starboard side, isn't that true, or is that just the way the picture was taken? [383]

A. No. The one —

Q. I am referring to this one here. We have had that identified as the port ladder and it appears in the picture to be closer —

Mr. Hon: Just a minute, Mr. Gallagher.

Mr. Gallagher: I will withdraw that question.

Q. Is this ladder that I am drawing my finger along now as far away from the hatch coaming as this one over

(Testimony of J. J. Schleef)

here? What did you refer to when you said 24-inch centers?

A. Well, 24 inches between the two, on centers of the ladders, but it isn't the same space between the coaming there and this first ladder. I would say that is only about half the distance, at the worst.

Q. The ladder which is closest — or I will call it the port ladder. It is closer to the port side of the hatch coaming than the starboard ladder is to the starboard side of the hatch coaming?

A. Oh, yes; more than twice.

Mr. Gallagher: Is that what your Honor had reference to?

The Court: I would like to know this also. This Exhibit F is an exhibit of this same vessel, is it not?

Mr. Gallagher: Yes, your Honor.

The Court: What is right behind that spot that I am pointing to? What is that spot that I am pointing to, that [384] upraised part there?

A. That isn't an upraised part. This is the pump room scuttle that this eventually comes in. That is a house there.

The Court: And what is this here?

A. That is just dark underneath there.

The Court: And you can't identify that particular —

A. There is a little hatch there, that goes into the summer tank pump room, that is about 18 inches high, but it is not this hatch at all. That goes into the summer tank pump room.

Q. By Mr. Gallagher: Mr. Schleef, after you helped this young man out of the bunker hatch, where was he taken?

(Testimony of J. J. Schleef)

A. Well, we laid him on deck first and the Navy tender have doctors there and we sent for a doctor to attend to him. They wrapped his leg in a board and fixed him up on the stretcher and took him ashore, and the Coast Guard ambulance took him away.

Q. Was anything done to the bunker hatch right after this accident happened?

Mr. McHose: I object to that. I don't see any relevancy or materiality as far as after the accident happened.

The Court: It may have some bearing on it. He may answer.

Mr. McHose: Well, how, your Honor? [385]

The Court: If it hasn't, it doesn't count, does it? It may have some bearing on it.

Mr. McHose: I think the law is well established, your Honor, that, if something is done after an accident happens, it is not material evidence with respect to the cause of the accident. If Mr. Gallagher is going into the question of whether somebody brought a light or rigged up a rope or something of that sort, which I assume is what he is driving at, personally, I don't think it makes any difference whether that was done. Either the ship could have done it or we could have done it but whether we or they did it I don't think has any materiality.

Mr. Gallagher: I think it does, your Honor. If the ship did it, then it could be argued that the ship realized that the thing should have been roped off and lighted.

Mr. McHose: I don't think so, your Honor. The situation I am in is I don't know whether anything was done and, as I have said several times before, we didn't know we were going to be involved in a lawsuit until a

(Testimony of J. J. Schleef)

year after this happened. We have not been able to get any evidence as to what happened and I am not prepared to offer any evidence on that subject. And I think the law is quite well established, for example, in a city case, where there is an accident in an excavation, that evidence that somebody then brought out a red lantern and put it at the excavation is not admissible. [386] And we think this is exactly the same situation here. It is an attempt to show something that was done after the accident that wasn't done before. The only question is was there some negligent condition there before the accident and whose fault was it.

The Court: You say it is not admissible if a red light is placed at the scene of an accident, where there is an embankment or something of that kind?

Mr. McHose: After the accident has happened.

The Court: You say that is a rule of law?

Mr. McHose: That is my understanding.

The Court: On the same theory, what difference does it make what the libelant did, whether they sent him in an ambulance or what happened?

Mr. Gallagher: I think this is all part of the *res gestae*.

Mr. McHose: I don't think it is of any materiality and I think it is inadmissible.

The Court: I think it is admissible. It may or may not have bearing on the situation, probably not, but, at any rate, it happened so close, I imagine, after the accident happened — let's see what happened on these premises.

Mr. Gallagher: Your Honor will recall the Coast Guard intelligence officer. He testified, when he got

(Testimony of J. J. Schleef)

there, there was a light and a rope, and we are entitled to have explained [387] how it got there, if he knows.

The Court: Your objection is overruled.

Q. By Mr. Gallagher: Will you answer the question, Mr. Schleef?

A. Yes; there was a light in a place there and the hatch was put back on the support and a rope put around it. I don't know just how quick; maybe within half an hour, because they didn't show any speed in getting this boy ashore to do anything about his leg.

Q. Who put the light there and put the hatch down on the stiff leg?

A. It wasn't the ship's crew. It was Bethlehem's men because I recognized the temporary light man. When our lights went out at night in the quarters, we were to call for the temporary light man because it was up to them to furnish them lights.

Q. Do you mean that you called for the temporary light man?

A. Not on this case because that light didn't interest me.

The Court: I don't know whether that fact should be taken into consideration in determining just what happened then but it is so near the time of the accident that it may have some bearing in relation to the testimony given by the other witnesses. [388]

Q. By Mr. Gallagher: Did Bethlehem continue to do work in that particular tank after the accident?

A. Oh, yes, until that work was completed; I would say about 10 days maybe or in that neighborhood.

Q. Mr. Schleef, you testified that you had been on that particular vessel for a good many years.

A. Quite a few.

(Testimony of J. J. Schleef)

Q. There has been testimony that there was a canvas flap at the entrance to the starboard passageway and a canvas flap over here at the exit from the port passageway. I would like to have you state to the court whether there was any canvas flap or cloth flap or covering of any kind or character at either end of those passageways.

A. The only cover there was in the alleyways, to my knowledge, — I never saw a flap — was the water-tight doors themselves. It was not a canvas flap.

The Court: I don't think I understand you. Have you a photograph that you can illustrate with as to the questions you are asking? Are you referring to this particular door?

Mr. Gallagher: Yes, your Honor.

The Court: Now, what is your question?

Mr. Gallagher: My question is this, whether there was any canvas or cloth flap anywhere near the door. Your Honor will recall the young man said, when he went to go in to the starboard passageway, he pushed a flap back and stepped over [389] the coaming and walked back and made a turn and then, when he came out the port passageway, he took his hand and opened a canvas flap and stepped out. I want to find out whether there was or was not a flap of any kind in either of those doors at any time, including the night of the accident, so far as this witness knows.

The Court: Go ahead.

Q. By Mr. Gallagher: Mr. Schleef, was there any canvas or cloth flap anywhere near either of the openings at the forward end of that after house?

A. Never to my knowledge was there ever a canvas flap there.



(Testimony of J. J. Schleef)

Q. Was there any cloth flap or oil cloth or any other kind of a flap?

A. No; nothing but the steel door itself.

Q. How far from that steel door or opening was the closet light? A. Well, —

Mr. McHose: What kind of a light?

Mr. Gallagher: Well, an electric light, a permanent light.

A. The permanent lights in the alleyway — I think the nearest one was, I would say, about 15 or 16 feet to the opening of the door. That would be after the water-tight door.

Mr. Hon: Did I understand that is aft of the port passage- [390] way, at the rear there? A. Yes.

Q. By Mr. Gallagher: It is aft of the door through which the young man came? A. That is right.

Q. And that was about 15 or 16 feet to the opening of the door?

A. Just about where the last light is.

Q. Did that light furnish any illumination for the surface of the deck immediately outside of the hatch through which you made exit from that port passageway?

A. No. There is no light would shine because at the time this was during the war and we had shields on those permanent lights. They all had the wire guard and we shielded them with metal or tin so it wouldn't reflect out on the deck. So the passageway in that particular place is quite dark.

Q. So that there would be no light on the deck immediately outside of that hatch which would illuminate the deck at all?

A. None at all; no illumination.

(Testimony of J. J. Schleef)

Q. And was there ever any canvas or cloth covering over the hatch at the forward end of the starboard passageway? A. None there, either.

Q. You call doors hatches, don't you?

A. They are water-tight doors. [391]

Q. Going into the alleyway, do you mean?

A. Yes.

Q. There was no canvas or cloth or other covering excepting the water-tight doors at the forward end of either one of those alleyways? A. That is right.

Q. I will show you Respondents' Exhibit A, which shows the water-tight door at the forward end of the passageway. A. Yes.

Q. Is that the only kind of a covering that was ever at that port exit, to your knowledge, while you were on the boat?

A. That is the only one.

Q. And was there the same kind on the starboard side?

A. The same condition on the starboard side.

Mr. Gallagher: You may take the witness.

#### Cross Examination

Q. By Mr. Hon: Just a couple of questions, sir. I am now referring to Tide Water Exhibit E. When you brought your ship, the Frank Drum, into the Bethlehem Steel Company yard, the door or covering to the hatch was in the position as shown in this picture, wasn't it, on the stiff leg? A. Yes.

Q. Or what do you call it?

A. It is the support. [392]

Q. It was in that position? A. In that position.

(Testimony of J. J. Schleef)

Q. Why was it in that position?

A. Well, that is the way we always leave the hatches and, besides, anybody couldn't fall down there. It was for safety.

Q. In other words, you leave it there as a safety measure, is that right?

A. That is what you have to do.

Q. In other words, you are required to do it, aren't you?

A. Required to do it.

Q. To keep people from falling into it?

A. Falling into it.

Q. And good practice requires that?

A. I would say so.

Q. Why did you have the rope around it? Was it as an added precaution?

A. Well, a person may stumble there and, if you didn't have a rope around it — you know people going to sea don't always come aboard sober and you have to guard against those things.

Q. Alcohol didn't have anything to do with that, did it?

A. Not in this case where the boy broke his leg. [393]

Q. Now, Mr. Schleef, a couple of questions. As I understand, you say that there was no light closer to the port exit, marked Exhibit 2—there was no light closer than 15 or 16 feet?

A. To that.

Q. And that was a rather dim light, was it?

A. It was shielded. During the war we shielded them within so the light would show aft and not out the door.

Q. It was dark right there at the door, wasn't it?

A. It was dark.

(Testimony of J. J. Schleef)

Q. There was a door there, is that right?

A. Well, you might have seen the door because the inside alleyways are painted white.

Q. There was no light cast from the passageway out onto the 'midship deck? A. None.

Q. At or near the port passage opening?

A. No; you couldn't see any light out there.

Q. You saw Richardson come aboard the boat and knew he was a Coast Guardsman?

A. I saw him when he come up the main deck, up the gangway.

Q. You knew he was a Coast Guardsman making an inspection, or at least you assumed it?

A. Oh, yes. [394]

Q. You saw him pass around the engine room and go into this passageway, didn't you? A. I did.

Q. You were up on what?

A. I was up on the top engine room grating.

Q. In order words, he entered this port passageway leading forward? You saw him enter it and then didn't see him after that?

A. I didn't see him after he left the engine room and went into the port alleyway. I didn't see him again until we hauled him out of the tank.

Q. Mr. Schleef, how long had you been on the Frank Drum continuously prior to the happening of the accident?

A. From the 30th of July, 1937, up to that date.

Q. My question was misleading to you and I assume it is my fault. How long had you been continuously on the ship without getting off the ship, before the accident happened? In other words, you had been there at least

(Testimony of J. J. Schleef)

so long a time, without getting off the ship, when the accident happened.

A. I came aboard at about 3:00 o'clock Sunday afternoon.

Q. And the accident happened about 9:05 or somewhere around there?

A. Somewhere around 9:30 or so.

Q. You came aboard about 3:00 o'clock? [395]

A. About 3:00 o'clock.

Q. So that, when the accident happened, you had been aboard the ship for just 6-1/2 hours? A. Yes, sir.

Q. How long had you been off the ship prior to your coming back at 3:00 o'clock?

A. I went ashore about 8:00 o'clock that Sunday morning.

Q. On Sunday, I take it, then, that you left the ship at 8:00 o'clock in the morning and got back on at 3:00 o'clock? A. Yes, sir.

Q. And was on it up to the time of the accident?

A. Yes.

Q. Now, I am going to take 8:00 o'clock Sunday morning. How long had you been continuously on the ship prior to 8:00 o'clock Sunday morning?

A. Well, I wouldn't know. I went out to dinner Saturday night because we didn't feed aboard.

Q. About what time?

A. I would say I got back about 9:00 o'clock.

Q. Were you aboard the ship at 3:30 Saturday afternoon, August 6th, when they quit work, the Bethlehem?

A. No; I wasn't.

Q. At the times from 3:00 o'clock Saturday afternoon until Sunday night at 9:00 o'clock, or during the times

(Testimony of J. J. Schleef)

that you were off the ship, who was on the ship from the Tide Water [396] people?

A. There was always one engineer standing security watch and one oiler or fireman. Their names I don't even remember. Sunday I came back and relieved the first assistant, and he was standing engineer's security watch, and I let him go home because I was going to be aboard.

Q. During the time from 3:00 o'clock Saturday afternoon, and, when I say Saturday afternoon, I mean August 5, 1944, — from Saturday afternoon at 3:00 o'clock up until Sunday night at 9:00 o'clock or 9:30, had you at any time either gone in or come out of the aft port entrance? A. No, sir.

Q. Had you been at or near or in close proximity to the port entrance passageway?

A. No. The first time I was on the port side was when I heard the boy hollering for help.

Q. And that was the closest you got to the port passageway?

A. There is a ladder right directly near the alleyway doors and I come aboard on the starboard side, and my quarters are on the starboard side and I had no occasion to go to the port side.

Q. Mr. Schleef, were any inspections of the ship, regular inspections, made, or were there regulation inspections of the ship made during August, 1944? [397]

Mr. Gallagher: Inspections by whom?

Mr. Hon: By anyone connected with Tide Water.

A. From my department — all I was interested in is what happened in the engine department. My job is to stand security watches and to see that the ship don't sink or that the bilges fill up and the like of that.



(Testimony of J. J. Schleef)

Q. In other words, as chief engineer, you have your duties.

A. I have my duties.

Q. There was a boatswain on board, wasn't there?

A. Yes.

Q. What would be his duties?

A. The security watch, as I understand, is mostly to see that the lines are kept tight so that she don't break away from the dock and the like of that.

Q. The boatswain's duties were separate and apart from the chief engineer's?

A. Oh, entirely.

Q. Can you tell us what the duties of the boatswain were while it was tied up there for repairs?

A. I think some mate on the ship could tell you better than I could.

Q. There was a third mate on the ship, wasn't there?

A. Yes; that particular night.

Q. And that was Mr. Basango? [398]

A. No. That is the name of the mate. It was Mr. Humble.

Q. Do you know what the duties of the third mate are?

A. He is here and can answer those questions better than I can.

Mr. Hon: The third mate is going to take the stand, is he, Mr. Gallagher?

Mr. Gallagher: Yes.

Q. By Mr. Hon: I believe you testified, didn't you, that at times you were all over the ship?

A. More or less, while work is going on.

Q. That didn't include the times when the workmen stopped, is that right?

(Testimony of J. J. Schleef)

A. No. I generally stop before they do. They work all night and I don't. I can quit at 4:00 o'clock in the afternoon.

The Court: Did you ever see a canvas flap at that opening, either before or after the accident?

A. No, sir; I never saw one either before or after. But the door could have been shut, the steel door.

The Court: The steel door?

A. It swings on hinges.

Q. By Mr. Hon: It swings on a hinge?

A. Yes.

The Court: Which way does it turn? [399]

A. It pushes outboard. In other words, as he come out, it would turn to his left.

The Court: Onto the 'midship?

A. Out onto the main deck.

The Court: It would push out in the direction he was going?

A. Oh, yes. It pushes outboard.

Mr. McHose: I think one of these photographs shows that pretty clearly.

The Court: I don't see anything in that opening at all. Is that the door?

A. That is the door there and that is the opening for the door and it swung open.

Mr. Hon: That throws the door back.

Mr. McHose: Your Honor, also on the blueprint the drawing shows that the door opens out this way, as you can see from the drawing.

Q. So that it fits back fairly flush against the bulk-head, doesn't it, Chief?      A. It does.

(Testimony of J. J. Schleef)

Mr. Gallagher: Would I be accused of being a clock-watcher if I asked your Honor for a recess at this time?

Mr. Hon: That is all.

The Court: We will take a recess at this time for 15 minutes. [400]

(Short recess.)

Mr. Hon: I have just a couple of more questions, please.

Q. Mr. Schleef, what was the last time that you either walked in or out of the port passageway before the accident?

A. I couldn't answer that without definite knowledge because it may have been some time Friday, or I might have gone out of there Saturday morning.

Q. Well, Saturday morning before the accident would be the latest, wouldn't it?

A. That would be the latest; some time during the forenoon.

Q. Of your own knowledge, you do not know whether there was a canvas flap on that port entrance or exit at the time of the accident or not, of your own knowledge, do you?

A. Unless somebody put one up there from the last time I went through there. No; I couldn't say.

Q. Just one other question. This happened in war-time, August 6, 1944, and you made a statement that the lights were dimmed to the aft of the ship to keep the light off of the deck?

A. From shining out onto the deck.

Q. That port passageway and that port exit and entrance are used quite a bit, aren't they, in and out?

A. At what time?

(Testimony of J. J. Schleef)

Q. Well, at various times and, particularly, when there [401] are workmen on the ship.

A. In the shipyard, it was probably unhooked all the time. The dogs on the door would be unhooked while the ship was in for repairs.

Q. And that would leave the door open?

A. It might be open.

Q. Wasn't it required that the ships were required to keep all openings closed during the wartime?

A. In operation, we always had it dogged down.

Q. What do you mean by that?

A. The door has dogs on it, dogs, and they are clamped down. You have to use a hammer or pipe to open it.

Mr. McHose: Point those out to the court.

A. Yes. There are eight or 10 on each door.

Q. By Mr. Hon: Isn't it true in a passageway, where there were doors which were in constant use by people on ships, that they oftentimes left the doors open so that people could go back and through this passageway each time, and blockout the light by a canvas flap?

Mr. Gallagher: That is objected to as what might have been done on other ships.

The Court: You are wandering away from what happened here.

Mr. Hon: Your Honor inquired about it and that is the only reason I was following it up. [402]

The Court: I don't think there is any particular harm to his answering it if he can.

A. This particular ship that I was on didn't have any canvas flaps, but the upper alleyways, which would be subject to more light, had what they called black-out doors that you would walk around. In other words, one over-

(Testimony of J. J. Schleef)

lapped the other and you had to walk like in a mystic maze to find your way around, and it wouldn't show light, and these were dogged down at all times only when we were in port, in daylight, to get in stores, but that is all. Mr. Hon: That is all.

Mr. Gallagher: Before Mr. McHose gets started, I want to offer this photograph Respondents' Exhibit E in evidence. It is only marked for identification at the present time.

The Court: It may be received.

#### Cross Examination

Q. By Mr. McHose: Chief, you were in the employ of the Associated Oil Company for quite a long time before this accident happened? A. Yes, sir.

Q. And you were in the employ of the Associated Oil Company at the time it happened? A. I was.

Q. You continued on salary, did you, while the ship was in the shipyard?[403] A. Oh, yes.

Q. Was the same thing true with the rest of the crew of the ship?

A. Everybody that worked on there gets their pay or they would go home.

Q. And you were paid by the Associated Oil Company? A. Sure.

Q. Who else was working on the ship while it was in the yard? Do you remember? Just roughly.

A. Do you mean of the Tide Water employees?

Q. Yes.

A. Well, we had three engineers and about six in the crew or maybe eight in the crew. I had nearly a full crew in the engine department.

(Testimony of J. J. Schleef)

Q. Was there nearly a full crew in the deck department? A. I couldn't say as to that.

Q. There were also licensed deck officers?

A. Licensed deck officers.

Q. And there was always at all time while you were there a licensed engineer? A. Yes, sir.

Q. And also a licensed deck officer? A. Yes, sir.

Q. And your job was up in the engine room?

A. Yes, sir. [404]

Q. So you didn't have any particular responsibility other than in the engine room?

A. Other than the repair work.

Q. Tell me what you mean by that?

A. Well, the port engineer is aboard during repairs and I assist him, and we have to see that the work is carried on, to see that it is done according to specifications.

Q. To make sure that the shipyard does a good job?

A. To get as good as you can get.

Q. Did you have anything to do with the repair to the plates that necessitated going down into the bunker hatch?

A. Not until they had them in and tested the plates for leaks.

Q. And then you checked up on that?

A. It was either myself or the port engineer.

Q. Had you been down in the port bunker tank while this work was going on?

A. Not while the work was going on.

Q. You said, on direct examination, the work continued in this bunker tank after the accident happened.

A. I would say I think the work continued for about a week or so.



(Testimony of J. J. Schleef)

Q. What I want to be sure about is this. There wasn't any work going on there that night, was there?

A. Not Sunday night; no. [405]

Q. In fact, the shipyard stopped work Saturday afternoon and resumed it again Monday morning?

A. Yes.

Q. So that the night the accident happened there wasn't anybody working down in the bunker hatch?

A. Not at that particular time.

Q. Do you know who was the roving guard on the ship on the night at the time that the accident happened?

A. I don't know his name, naturally.

Q. I don't mean the Coast Guardsman. I mean the roving guard that is provided by the ship.

A. The deck department have a security watch but there is no roving guard. The Coast Guard is the only one that furnished a roving guard.

Q. The federal regulations, Chief, call them a roving guard, to be on duty at all times. Now, are you familiar with that or don't you know anything about it?

A. Oh, yes; I saw them, what they call a marine guard.

Q. Was there a roving guard on the ship at that time?

A. There was one at the gangway, I know, because I saw him.

Q. There was a gangway guard, was there?

A. Oh, yes.

Q. And the law requires a gangway guard be maintained at all times? [406]

A. At all times.

Q. And that man was in the employ of Associated Oil Company?

A. Yes; I guess they hired him for that purpose.

(Testimony of J. J. Schleef)

Q. Did you see any of the Bethlehem Steel personnel on the ship the night this accident happened, before the accident? A. Before the accident, no.

Q. With respect to the lights, I want to be quite clear about this. When you came into the yard, you shut down your plant on the ship?

A. Yes; I shut down the plant.

Q. In order to get electrical power on the ship, you took a power line over and plugged that into their main electrical system, did you not?

A. Yes; they hook it on our main switchboard.

Q. And that makes it so that every light switch on the ships works just as it would as if you were using your ship power, just the same? A. Yes.

Q. And, anybody that wants light on the ship throws a switch? A. Yes.

Q. And there were permanent lights, I think you said, up in the masts? [407]

A. Yes, sir; about 30 feet up.

Q. Where is that on the blueprint?

A. The main mast ought to be about right there. It says "Mast."

Q. That is quite a little way forward of the bunker hatch, isn't it?

A. Yes; about half-way between the 'midship house that runs right in here and the bunker.

Q. How many feet, roughly, would that be from the bulkhead to the mast?

A. Well, I would say it is a good 80 feet or say 70 or 80 feet.

Q. And there are a lot of obstructions, aren't there, between the mast and the bunker hatch? A. Yes.

(Testimony of J. J. Schleef)

Q. Including the pump room scuttle, as you call it?

A. Yes.

Q. Do you know whether the lights on the main mast were on that night?

A. I couldn't say. I never shut them off. That is the reason they leave them on day and night in the shipyard. The shipyard furnishes the light. The mate is the one who can turn it off, if he wants to, and turn it on and would be more apt to know. For the masts they are up in the 'midship house, the panel board. [408]

Q. You were down there at the scene of the accident shortly afterwards?

A.\* Shortly afterwards.

Q. Do you remember whether the lights on the main mast were on at that time?

A. I am almost sure they were on. They are on all the time.

Q. Did they provide any illumination at this hatch?

A. Not enough.

Q. What do you mean by that?

A. Not enough to light up the deck. It was dark around the hatch.

Q. In addition to the running of the power line to the ship's main electrical system, the shipyard also runs temporary lines on board, doesn't it?

A. Yes; the full length of the ship and down in the engine room.

Q. There are a great many places on board where you have got to have lights in order to see to do work?

A. Yes.

Q. And one place in particular would be the bunker tank in which they were working?

A. Oh, yes.

(Testimony of J. J. Schleef)

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A. Yes.

Q. And one place in particular would be the bunker tank in which they were working?

A. Oh, yes.

(Testimony of J. J. Schleef)

Q. They would have to run temporary lines down there? A. Yes. [409]

Q. And the same thing would be true in other parts of the ship?

A. Yes, sir.

Q. What do you need to do to plug a light in?

A. They have connections, you know, and they just push it in the socket. They have regular boxes, with maybe six or eight connections.

Q. It is just an electric light plug?

A. That is what it is.

Q. You can plug in any kind of a light that is on a cord? A. Sure.

Q. You have on board the ship portable lights, have you not?

A. Yes; we have portable lights but they wouldn't plug in those systems. We had a different type of plug entirely.

Q. You have plugs where you can plug in on the ship your own portable lights?

A. Our own portables; yes.

Q. As a part of the ship's system, for instance, if you wanted to rig a gangway, you would get a portable light and plug it in somewhere and run it over the gangplank?

A. Yes.

Q. I think you said that you had ordered somebody to do something just shortly before the accident happened. What was [410] that? To see that the boiler was dry?

A. One of the security watch that was in the engine room, the oiler or fireman — he was down in the engine room and I whistled down and told him, if the bilges were dry, to go to bed and, if they weren't, to pump them out and for him to turn in.



(Testimony of J. J. Schleef)

Q. That was just one of the duties?

A. The routine of the man on watch, the security watch in the engine room.

Q. While you were on board the ship, Chief, to whom did you report? Who was your superior officer?

A. The port engineer while we were in the shipyard.

Q. Was the captain on board?

A. Not that night.

Q. He was on board while you were in the yard, was he?

A. Yes; he was there week days, but he probably went ashore Saturday morning. They all take turn in standing watches.

Q. But, while you were there, the port engineer supervises the repair work and he is the man to whom you report?

A. Yes, sir.

Q. Was he on board the night the accident happened?

A. No; he wasn't.

Q. After you butterworthed the tanks, Chief, — am I correct in understanding that you did that job on the ship? [411]

A. That was done at sea.

Q. That means you steamed out the port bunker tank?

A. Yes, sir.

Q. You knew the work was going to be done?

A. We knew the work was to be done.

Q. And, after you steam out a tank like that, you leave the hatch open for ventilation purposes, don't you?

A. Oh, yes.

Q. It is important to do that?

A. It is important.

(Testimony of J. J. Schleef)

Q. And, when the ship got into the yard, it was also necessary to wipe the tank down and to see it was gas free?

A. Yes; so the men could work in there.

Q. Men are not permitted to work in a tank until they get a certificate from a chemist certifying it is safe for men and for fire?

A. Yes. - It may be gas free and yet not safe for fire. In other words, they call it hot work or fires in a compartment. It wouldn't be safe for that.

Q. So, before Bethlehem could start working on this tank, they would have to have a certificate from a chemist that it was safe for men and safe for fire?

A. Absolutely.

Q. Did you see workmen from the California Ship Service Company doing work there? [412]

A. I couldn't say who they were but I surmised it either them or Martin's men that cleaned that tank. It may have been the Bethlehem. They generally hire the California Ship or Martin gang.

Q. They are companies that specialize in that?

A. Yes, sir.

Q. And somebody did come on board and work on the tank for some little time before work actually begun, is that correct?

A. I think it took them about two days for them to clean it out.

Q. When did they come into the yard?

A. We knew they came in on the 26th, looking up the records.

Q. Did you notice whether the Ship Service people took the rods off the hatch that you described to us?

(Testimony of J. J. Schleef)

A. I couldn't say whether it was the Ship Service people. It wasn't the ship's crew.

Q. How do you know that?

A. Because none of them worked there.

Q. You didn't have anything to do with the deck crew, did you?

A. No; not with the deck crew.

Q. You don't know that of your own personal knowledge? A. No. [413]

Q. The mate is the ship's officer who has charge of the deck, isn't that correct?

A. He probably could answer that question.

Mr. McHose: I think that is all.

Mr. Gallagher: That is all.

Mr. Hon: That is all.

Mr. Gallagher: May the witness be excused, your Honor?

Mr. Hon: I will stipulate he may be excused.

Mr. Gallagher: Mr. Humble.

ASA HUMBLE,

called as a witness on behalf of the respondent Tide Water Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Asa Humble.

Direct Examination

Q. By Mr. Gallagher: Mr. Humble, where do you live?

A. San Diego.

Q. What is your occupation? A. Seaman.

(Testimony of Asa Humble)

Q. In 1944, were you employed by the Tide Water Associated Oil Company?

A. I was part of the year.

Q. Were you employed by that company in July, 1944, and August of 1944, during the month of August and part of the month of July? [414]

A. I went aboard the 17th of July, 1944.

Q. Were you aboard at the time the ship came in to the Bethlehem Steel Company repair yards?

A. Yes; I was.

Q. Were you aboard while it was at sea, on the way to that place? A. I was.

Q. Were you aboard at the time some preparatory cleaning was done in the port bunker tank?

A. I don't recall the actual fact that the work was done. However, I was aboard from the time we discharged the last cargo until the time we entered the shipyard.

Q. Do you remember the fact that some work was done on that bunker hatch or tank?

A. I wouldn't say specifically that. I know that we were cleaning the cargo tanks and that could be among them.

Q. Did you have any opportunity to observe the condition of the port bunker hatch at the time the ship was brought in and tied up at the Bethlehem Steel Company dock?

A. I could have had but I don't recall.

Q. You don't know whether it was roped off or closed, then?

A. I couldn't say definitely.

Q. Did you at any time know that the bunker hatch was left open — [415]

(Testimony of Asa Humble)

A. Not while the ship was in the shipyard.

Q. — up to the time this accident happened?

A. Will you ask that question again, please?

Q. Did you ever see this bunker hatch open at night, while the ship was in the repair yard, before this Coast Guardsman fell into the tank?

A. I don't recall of having seen it open.

Q. Were you aboard the vessel on the night of the accident?

A. I was.

Q. And what were you doing?

A. I was on in the capacity of a security watch, a deck officer.

Q. What was your rank or rating?

A. Third mate.

Q. Will you tell the court what you know about this accident?

A. My first knowledge of the accident was when Mr. Schleef came to my room and informed me that there had been an accident, and I immediately went out on deck. The man had been removed from the ship and at that time was on the dock, and prior to that I have no knowledge of how it happened whatsoever.

Q. After the accident happened, did you see anybody come aboard with lights or any other equipment? [416]

A. I don't recall having seen it.

Q. After the accident happened, was anything done to the port bunker hatch that you know of?

A. Well, it was roped off and a light was placed over it.

Q. You don't know who did it?

A. I don't recall who did it but I did not order the deck force to do it.

(Testimony of Asa Humble)

Q. That is, you gave no orders to anybody in the crew to do anything like that?

A. That is correct.

Q. And where would such order have to come from, if it had been done by members of the deck department?

Mr. McHose: I object to that —

Mr. Gallagher: I will withdraw the question.

Q. Was there anybody else aboard who could have issued such an order, excepting you, that night?

A. Will you restate that, please?

Q. Was there anybody aboard who could have issued such an order to the deck department, that night, excepting yourself? There was no other member of the deck department who had supervisory capacity over the crew members of the department excepting you?

A. Excepting me.

Q. You were the only officer aboard so far as the deck [417] department is concerned?

A. That is correct.

Q. Mr. Humble, had you had experience with these Coast Guard roving guards before the night of the accident?

A. Yes.

Q. Was there any general custom down there at San Perdo with reference to what they did?

A. The usual procedure was for them to contact me on board and secure information which would enable them to fill out a regular mimeograph form which they carried.

Q. And what were the things they would inquire about and put down on this mimeographed form?

A. One item which seemed to be of very much importance was the fire watch and the cables made fast



(Testimony of Asa Humble)

to the bits of the ship or wire ropes leading out over the side to within five or six feet of the water's edge; also, a portable extension light near the cable, and this would enable the ship, which was dead at the time, to be towed away from the dock in the case of an emergency. Other things they inquired about sometimes is they would ask the engineer officer on watch about so they could complete their form. Then one was questions pertinent to the fire equipment aboard.

Q. When these Coast Guard roving guards would come aboard and get that information from the mate, then what would they do as a general course? [418]

A. They would ordinarily leave and, after that, I would see them no more. However, I do recall of having them come aboard at two different times during the night. Usually they would come aboard earlier in the evening and around midnight.

Q. Making the same inquiries?

A. The same inquiries and the same form.

Q. Mr. Humble, do you recall whether the cargo lights were on on the night of the accident?

A. I do not. However, I know, being in port, it is customary for us to put them on. But I do not recall whether they were on on this particular night.

Mr. McHose: Do you mean the lights up on the main mast?

Mr. Gallagher: Yes; the light up on the main mast.

Q. Is that the one you are talking about?

A. Yes, sir; that is correct.

Q. Were there any lights or light fixtures out on the main deck or above the main deck, excepting on the main mast?

(Testimony of Asa Humble)

A. To the best of my knowledge, we had, and I don't know who rigged it, a flood light on the catwalk, which was a number of feet above the deck, reflecting its rays of light toward the gangway.

Q. That is, the gangway which was on the starboard side? [419]

A. To the dock; yes. And there may have been other lights at the gangway. I don't recall.

Q. Did you have any occasion to go near this particular bunker hatch at any time while the vessel was in the shipyard? A. No, sir.

Q. Was there any work done by any members of the crew at or about that port bunker hatch during the time the vessel was at the shipyard?

A. Not to my knowledge.

Mr. Gallagher: Take the witness.

Mr. Hon: I have no questions.

#### Cross Examination

Q. By Mr. McHose: Mr. Humble, how old are you?

A. 30.

Q. How long had you been going to sea in 1944?

A. Approximately 3-1/2 years; in the Navy from 1934 and in the merchant service from June 15, 1943.

Q. And you had a third mate's license, did you?

A. From October 12, 1943, I believe.

Q. The night of the accident you were the senior deck officer on board the ship?

A. That is correct.

Q. And the ship was under your control, was it?

A. I wouldn't say that. [420]

(Testimony of Asa Humble)

Q. You were the senior officer on board?

A. The senior deck officer aboard; the only deck officer aboard.

Q. The chief engineer was also aboard?

A. He was also aboard.

Q. You had joint control with him? Is that what you mean?

A. I wouldn't say that.

Q. If anybody wanted to report something, if something was out of the ordinary and some one of your crew found it out, to whom would they report?

A. It would depend on what department it pertained to.

Q. If it was in the deck department?

A. I assume they would report it to me. That is not always the case, however.

Q. That is what they are supposed to do?

A. Well, it is customary to report to your superior officer.

Q. There wasn't any other officer on that ship who was superior to you?

A. In the deck department, no.

Q. Now, you said that you didn't know who brought a light out and put ropes around this place after the accident happened that night.

A. That is correct. [421]

Q. You didn't give any orders for any of your crew to do it?      A. I did not.

Q. But someone might have done it without you giving them orders, without you knowing it, isn't that true?

A. I didn't know who did it and I gave no orders to do it.

(Testimony of Asa Humble)

Q. Someone on the ship might have done it or someone from the shore might have done it?

A. That is true.

Q. The floodlights that you have spoken about— you turn those on from some point on the ship, do you not?

A. The cargo lights. There is a switch to control them.

Q. And what about this floodlight that was at the gangway? Where is that turned on?

A. That I do not know because I do not know who rigged it and I don't know where it was turned on from.

Q. You didn't happen to light it yourself at any time?

A. No.

Q. What about the portable extension light that you spoke of a few moments ago? Where was that?

A. That was on the offshore side at the bow and at the stern of the ship.

Q. Who rigged that light? [422]

A. The deck department is required to rig that.

Q. Who would turn that on at night?

A. It was my duty to see that was done, as the security officer on watch.

Q. And you did that? A. I did that.

Q. Did you also have a portable extension light hanging down over the propeller?

A. Not necessarily the propeller but over by the stern of the ship.

Q. And that was also turned on by you?

A. Yes, sir.

Q. And, at night, any lights you wanted on the ship, you merely would go over and turn them on?

A. Under ordinary circumstances; yes. It could have been at times there were circuits cut out.

(Testimony of Asa Humble)

Q. But you did have electrical power plugged into the ship from the shore?

A. I know I had power in my room. It was reported that the plant was shut down.

Q. You had portable extension lights aboard the ship, did you not?

A. With marine fittings. By that I mean a large fitting with contacts on either side, and these are placed in a marine box, with a cap on it. They are not the ordinary [423] male type of plug.

Q. But you did have places on the ship where —

A. We had marine outlets on the ship to which that could be attached.

Q. Were you using ship's portable lights for the extensions over the bow and the stern? A. Yes.

Q. The kind that you have just described?

A. Those were required before we went into the shipyard, as a port security measure.

Q. And, if you wanted other lights, you could have directed the shipyard to provide them for you, could you not?

A. I could have but I don't recall ever having done it.

Q. Do you know who was serving as the roving guard on the ship at the time the accident happened?

A. I do not.

Q. You had a roving guard on the ship, did you not?

A. I couldn't swear to that.

Q. Are you familiar with the regulations for tank vessels within the Los Angeles-Long Beach defensive sea area?

A. May I see it, please? I don't recall ever having seen that book. However, I do recall of having seen a

(Testimony of Asa Humble)

small blue book, about three or four inches, that had something to do with those regulations, which had something about port security. [424]

Q. Would this be the little book that you speak of?

A. I believe that is it.

Q. Are you familiar with the regulations in here that provide that a ship in port should have on duty at all times a roving guard?

A. I am not familiar with it now. It could have been that I was then. I don't recall whether I saw that before I went aboard the ship or after.

Q. If there had been a roving guard on board the ship, he would have reported to you?

A. No; they never report to us.

Q. To whom did they report?

A. I don't recall of them ever having reported to me.

Q. Were there gangway guards on the ship during this time?

A. I don't recall that.

Q. You did not personally give any instructions as to duties to guards on that ship?

A. No, because I don't recall the guards.

Q. Were you on board the ship on Saturday, the 5th of August? A. No to my knowledge.

Q. When did you go on board?

A. Some time prior to the accident, Sunday.

Q. Who had been the watch officer in charge prior to [425] the time you went on board?

A. It was either of the other mates, Mr. Vanover or Mr. Frederick.



(Testimony of Asa Humble)

Q. Were you standing regular watches at that time?

A. Not regular schedule watches; no. Just one mate was required to be on board.

Q. You worked at it between yourselves?

A. That is right.

Q. And you don't know who was on board Saturday afternoon? A. No.

Q. And you don't know who was on board Sunday morning before you were? A. No; I am not sure.

Q. What time did you go on board?

A. It was some time prior to the accident, I believe, Sunday.

Q. Mr. Humble, would you expect a Coast Guardsman, going on board that ship for inspection purposes, to go out onto an unlighted deck of the ship at night?

Mr. Hon: I object to that —

The Court: The objection is sustained, what he would expect.

Mr. McHose: No further questions.

Mr. Hon: No questions. [426]

Mr. Gallagher: That is all.

Mr. Vanover. I would like to have this last witness excused, your Honor.

The Court: Is there any objection?

Mr. Hon: No, your Honor.

Mr. McHose: No objection.

The Court: He may be excused.

ALBERT D. VANOVER

called as a witness on behalf of the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Albert D. Vanover.

Direct Examination

Q. By Mr. Gallagher: Mr. Vanover, where do you live?

A. Long Beach, California.

Q. What is your occupation?

A. I am on leave from the seafaring profession and at present employed as a boat builder.

Q. As a what?

A. As a boat builder.

Q. Were you employed by the Tide Water Associated Oil Company in July and August of 1914?

A. Yes, sir.

Q. Mr. Vanover, I will hand you respondent Tide Water Exhibit E and ask you if you ever saw the port bunker hatch [427] of the Frank G. Drum in a condition similar to the condition shown in that photograph and with rope guards somewhat like that.

A. I have seen the port bunker tank on the stiff leg or brace and secured with a line or chain, but I have never seen that line put on by a seaman such as this.

Q. The rigging of the line there is an unseamanlike job, isn't it?

A. Very much so.

Q. When did you see the port bunker hatch on the brace or stiff leg, with a rope guard rigged around it, with reference to the time the ship was taken into the Bethlehem Steel Company's shipyard?

(Testimony of Albert D. Vanover)

A. I am not positive that I saw that actual bunker hatch, on the Frank G. Drum on a stiff leg, roped off, in the Bethlehem Steel Company yard. I have seen them roped off but I am not positive if that was the case in the shipyard.

Q. Then, you don't recall whether the bunker hatch was roped off at the time the vessel was taken into the shipyard?

A. I do not recall that; no.

Q. Do you know anything about this accident that happened, of your own personal knowledge?

A. Nothing about the accident of my own personal knowledge. All that I know about it is hearsay.

Q. Did you at any time give any orders to any members [428] of the deck department to take any ropes away from the port bunker hatch?

A. That was not in my jurisdiction to.

Q. You were second mate or what?

A. Second mate.

Q. Did you ever give any such order? A. No.

Q. Did you have any personal knowledge of the fact that the port bunker hatch was open? A. No.

Q. You had nothing to do with the repairs?

A. Nothing at all.

Q. Do you know where the fire extinguishers were located on that vessel?

A. I know that they were located in a place that they would be easily accessible.

Q. Were they outside or inside?

A. Always inside.

Q. Were there any hydrants along the forward bulk-head of the after house?

A. I could not swear to that, as I do not remember.

(Testimony of Albert D. Vanover)

Q. Have you told us everything that you know about this case, if anything?

A. Yes, sir.

Mr. Gallagher: That is all. [429]

Mr. Hon: If he doesn't know anything about it, I don't know why I should cross examine him.

Mr. Gallagher: I wanted to produce as many officers as I could that were on duty at the time.

### Cross Examination

Q. By Mr. McHose: Did you ever instruct any roving guards about their duties? A. Never.

Mr. McHose: That is all.

Mr. Hon: I will stipulate he may be excused.

Mr. Gallagher: You may be excused. Mr. Frederick. Your Honor, this witness may take more time; in fact, I think he will; and I have one other witness coming tomorrow and that will finish it. If your Honor would take an adjournment now, I think we can still get through in about an hour in the morning.

Mr. McHose: I would like very much to push this thing along. I simply have to be through by 11:00 o'clock tomorrow morning if I can possibly do so. I think we can get a good bit of the direct examination finished this afternoon.

Mr. Gallagher: I am willing to go ahead.

Mr. Hon: I don't care, just whatever you gentlemen want.

The Court: We can proceed for 10 or 15 minutes and maybe you get through with the witness by that time. [430]

ADRIAN ROLLAND FREDERICK,

a witness for the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Adrian Rolland Frederick.

Direct Examination

Q. By Mr. Gallagher: Where do you live, Mr. Frederick? A. Los Angeles, sir.

Q. What is your occupation?

A. Well, my occupation at present is I am a retired seaman.

Q. For how long did you go to sea?

A. About 30 years.

Q. And during that time were you employed by the Tide Water Associated Oil Company?

A. Yes, sir.

Q. Were you on the Frank G. Drum?

A. Yes, sir.

Q. In what capacity?

A. As the chief officer or mate.

Q. And for how long had you been chief officer of that vessel?

Mr. Hon: Do you mean prior to the accident?

Mr. Gallagher: Yes.

A. I would have to look at my book in order to give [431] you the exact date. I don't recall it.

Q. Was it a question of years or months, weeks or days?

A. Months; several months.

(Testimony of Adrian Rolland Frederick)

Q. Mr. Frederick, do you know in what position and condition the port bunker hatch on the Frank G. Drum was at the time the ship was taken into the Bethlehem Steel Company's shipyards?

A. I do. I give the orders to secure it.

Q. Will you tell the court what the condition was and what was done?

A. I will.

Q. All right.

A. The hatch was resting on a leg attached to the lower side of the hatch itself or the door. This leg held the hatch open at about 45 degrees; in other words, about half-way open. This tank had been steamed out, washed out with the butterworth system of hot water and steam, and also aired out, for about five days before we entered the shipyard.

The Court: Go ahead.

A. And, besides this, there was a small what we would call on board a ship two-inch line attached to the bulk-head and laid around this hatch and fastened to the after side of the pump house. While it was only a light line, it would prevent anybody from accidentally falling into the hatch. In other words, it was just simply a safety measure in case some- [432] body might want to get down there.

Q. By Mr. Gallagher: Mr. Frederick, do you know who — withdraw that. Was the port bunker hatch in the condition you have told us about up to the time the Bethlehem Steel Company started to do work on that ship?

A. It was.

Q. And was it in that condition up to that time?

A. The condition that I have just described.

Q. Was that safeguarding removed by any member of the ship's crew?

A. It was not.



(Testimony of Adrian Rolland Frederick)

Q. During the time that the Bethlehem Steel Company's workmen were aboard the ship, did you observe them working at and in the vicinity of the port bunker hatch?

A. It was my duty to observe all work. Well, just one minute. Being the chief officer of this ship, it was my duty to be on board that ship, from 8:00 a. m. until 5:00 o'clock in the evening every day, to assist the port engineer Mr. Lundin in checking and seeing that the repair work was performed or carried out that was necessary for the ship. I also had charge of my boatswain and crew, and there is only certain work the crew can do in a shipyard. There are a number of things that the crew wouldn't do in a ship on account of the regulations.

Q. What are some of those things that the crew can't do?

Mr. McHose: Of what materiality is that?

Mr. Gallagher: I want whatever evidence is available.

The Court: You are going into a pretty wide field, what those members of the crew didn't do.

Mr. Gallagher: I will confine it, your Honor.

Q. Mr. Frederick, during the time the Bethlehem Steel Company was doing work in that port bunker tank, was there any duty to be performed by any of the ship's crew in or about that tank?

Mr. McHose: I object to that as calling for the opinion and conclusion of the witness and, furthermore, the only thing that is important so far as the case is concerned is what was done.

The Court: Can't you get right down to the point now and tell the witness what you want to know?

Q. By Mr. Gallagher: Mr. Frederick, did you have any personal knowledge, until after this accident hap-

(Testimony of Adrian Rolland Frederick)

pened, that the shipyard crew was leaving that port bunker hatch open every night when they left the job?

A. I certainly did.

Q. When did you find it out?

A. I saw it every morning when I came to work. The hatch was wide open.

Q. Was it ever roped off?

A. No, sir. It was just as they left it in the after-[434] noon.

Q. Was it ever lighted?

A. No, sir. Just a second. One or two nights they did leave their working light on down in the bottom of that tank.

Q. Was that illuminated at night?

A. The night that I observed it, it was.

Q. It was lighted?

A. It was lighted; yes.

Q. You weren't aboard on Sunday evening, were you, until after this accident happened?

A. No, sir; I wasn't.

Q. When you got aboard, did you observe anybody or any men installing any light or roping off this bunker hatch?

A. Well, I didn't come aboard until 8:00 o'clock Monday morning.

Q. You were not aboard Sunday night at all?

A. No; not at all. Mr. Humble was aboard. Mr. Humble and Mr. Vanover stood the night watches alternately.

Q. Then, you have no personal knowledge of any of the facts surrounding the actual happening of the accident?

A. I haven't, sir.

(Testimony of Adrian Rolland Frederick)

Mr. Gallagher: Take the witness.

Mr. Hon: No questions.

The Court: Did you see the shipyard crew leave after [435] their day's work, the next morning at 3:00 o'clock? A. I did, sir.

The Court: When was the last time they left the work?

A. At 3:30 Saturday afternoon.

The Court: And what was the condition of that opening at that time? Was the lid down or was it open or roped off or what?

A. It was secured to the bulkhead, the forward bulkhead, of the fire room.

Mr. Hon: Does that mean it was open?

Mr. McHose: Yes; I take it —

The Court: It was open?

A. It was wide open.

The Court: It was flush against the bulkhead?

A. Flush against the bulkhead; yes, sir.

The Court: Was it roped off in any way when they left the work?

A. No, sir; it wasn't. And, if I may volunteer —

Mr. McHose: Do you want him to volunteer, your Honor?

The Court: No. I don't want any answers that might be objectionable.

#### Cross Examination

Q. By Mr. McHose: Mr. Frederick, was the captain on board the ship while you were in the yard?

A. He was; yes, sir; practically every day except — I [436] don't think that he was aboard Saturday but —

(Testimony of Adrian Rolland Frederick)

Q. You virtually kept your entire crew on duty, didn't you, while you were there?

A. I only had a skeleton crew. I had a boatswain and five men, is all.

Q. You had men on duty more or less all the time?

A. Yes, sir.

Q. Were your men doing some work, work that the unions permitted you to do, on the ship while it was in the yard?

A. Yes, sir; we were overhauling and reconditioning the life boats. That was one thing that the union would allow us to do.

Q. Were you doing some ordinary ship's painting and maintenance work?

A. No; just on the lifeboats.

Q. Was some work being done in the engine room?

A. There is another thing that was entirely out of my jurisdiction. That was under the chief engineer. That was under Mr. Schleef's personal jurisdiction.

Q. And you wouldn't know about that?

A. Nothing.

Q. You know what work was being done in the port bunker tank, did you not?

A. I did.

Q. You knew, also, that it was necessary to use the [437] hatch in order to get down into that tank and do the work?

A. Certainly.

Q. And it, also, was necessary to lower any equipment or tools down through that hatch in order to get it down there to work with, wasn't it? A. Yes, sir.

Q. By the way, did you notice how they did that? Did they use a crane?

(Testimony of Adrian Rolland Frederick)

A. No, sir. The only thing they rigged down there was a staging, a plank staging, and all the work was done by the rigging gang of the yard.

Q. All I asked you was how did they get that down in there.

A. They put it down one piece at a time, that is, a plank or a timber.

Q. Did they lower it by block and tackle?

A. They lowered it mostly by hand.

Q. And the work had been going on in that tank for several days before this accident happened, is that correct?

A. Yes, sir.

Q. After the ship came into the yard, the tank still had to be gas freed or work had to be done on it before it was gas freed, isn't that correct?

A. They mucked out the bottom or cleaned out the bot- [438] tom.

Q. You saw workmen doing that, did you not?

A. Yes, sir.

Q. Were you present when these workmen first went down into the tank?

A. I don't recall whether I was or not.

Q. You didn't see anybody actually take that rope down you have spoken about or lift the hatch cover back from the stiff leg, did you?

A. All I know, sir, is that my gang didn't do it.

Q. You were not present when it was done?

A. No, sir.

Q. And you didn't order anybody to do it?

A. No, sir.

Q. And you didn't see who actually did it?

A. No, sir.

(Testimony of Adrian Rolland Frederick)

Q. Did you at any time while the work was going on there see the rope adjacent to the hatch?

A. I certainly did.

Q. Was it there near the hatch or where was it?

A. Well, as I said, one end of it was fast to the bulk-head and the other end of it was laid around the forward end of it. If I remember right, the rope was laid around —

Q. I think you misunderstood me. I am not talking about the way it was when you fixed it up yourself but, while the work was going on in that bunker hatch, did you see the rope any place? [439]

A. Yes, sir; laying on the deck.

Q. That rope belonged to the ship, did it?

A. Yes, sir.

Q. The night that you were there and saw a light down in the port bunker tank, did you happen to notice whether anybody was working down there at that time?

A. Yes, sir; the gang worked until 12:00 o'clock and then knocked off.

Q. They were working a 20-hour day?

A. Yes, sir.

Q. And it would be necessary for them to have a light down there when anybody was working in that compartment?

A. Certainly.

Q. The deck men on board the ship were under your control, that is, you gave them orders as to what they should do and so on?

A. Yes, sir; I gave my orders to the boatswain.

Q. You tell the boatswain what you want done and then he tells the men?

A. Yes. I am not supposed to go to the men. The boatswain doesn't like that.



(Testimony of Adrian Rolland Frederick)

Mr. McHose: That is all.

Mr. Hon: No questions. I will stipulate the witness may be excused.

Mr. Gallagher: That is all. May he be excused, your Honor? [440]

The Court: Just a moment. I don't know that I want to ask this witness about it but what do the rules provide about a situation of that kind, as to it being left open? I mean after the crew went away.

Mr. Hon: I think that is a question of fact for your Honor to decide.

Mr. McHose: Your Honor, there is no specific rule about such a thing as that.

The Court: What I have in mind is this. This witness states he saw this opening when these men left their work and, apparently, that remained open and there was no rope or no safeguard around that opening. I would like to know this. Was there a duty upon some member of the crew to see to it that that particular spot was safeguarded in some way?

Mr. McHose: I think Mr. Hon is right that this is a question for your Honor.

Mr. Hon: Your Honor, I contend this. I think that you, sitting as a Judge, may determine that by what an ordinarily reasonably prudent person, under the same or similar circumstances, would have done. I think that will be covered as a factual situation that we will have to cover in argument. That was one of my theories in suing both parties.

Mr. Gallagher: I will ask him the question.

Q. Mr. Frederick, why didn't you follow the shipyard crew around every night when they got through and take

(Testimony of Adrian Rolland Frederick)

charge [441] of that bunker hatch and put ropes around it or do something about it?

Mr. Hon: To which we object, your Honor. Every night wouldn't have anything to do with this case. He should confine it to the night of August 5th. Secondly, I think that is an attempt to invade the province of the fact-finding tribunal.

The Court: Was it anyone's duty, connected with the ship, or any other concern, having to do with this boat, to have that particular opening closed when it wasn't in use by the repairmen?

Mr. McHose: That, your Honor, is purely a question of fact for you to decide. There is no regulation that specifically states that to my knowledge.

Mr. Hon: That is where the law of negligence comes in. You will base that on what reasonably prudent persons would have done under the same or similar circumstances and apply it to both respondents alike.

The Court: I will sustain the objection.

Q. By Mr. Gallagher: Mr. Frederick, while work is being done on a ship in a shipyard, is it one of your duties to safeguard the parts of the ship where the shipyard is working?

Mr. McHose: I don't think that is a proper question, either. It is, obviously, his duty to safeguard any part of the ship, if he knows anything. [442]

Mr. Gallagher: That might be so and it might not. I guess I can't ask you why you didn't do it.

The Court: He had been ashore on the Sunday.

Q. By Mr. Gallagher: Were you there on Saturday?

A. I was; yes, sir; from 8:00 a. m. until 3:30 p. m.

Q. And you saw the shipyard people leave?

A. I did. The fact is I followed them off.

(Testimony of Adrian Rolland Frederick)

Q. And, at the time they left, did you see this bunker hatch open?

Mr. Hon: That has been asked and answered, your Honor, and I object to it.

A. I make it a habit while I am on board a ship to be on deck at all times when I am on duty, and I must have seen that hatch several times during that day and, when I did, there was always some of the yard men working around it or in it. As they had charge of that hatch, I didn't consider it my duty in any way, manner or form, to interfere in any way and I left it up to them entirely. I left it up to them to leave the hatch the way they found it, or I supposed they would anyway.

Mr. Hon: May I ask a question?

#### Cross Examination

Q. By Mr. Hon: Mr. Frederick, you knew, sir, as chief mate, that members of the United States Coast Guard would at different intervals inspect that ship, didn't you, sir? [443] A. Yes; I did.

Q. And you knew that they would inspect it night time as well as day time, didn't you? A. I did.

Q. You knew that, in inspecting that ship, they were likely to go over any portion of the ship, isn't that right?

A. I never followed them around. I don't know where they went. I will tell you I knew they came aboard and they had a paper for me to sign and I signed the paper and I answered their questions specifically, and signed the paper as the chief officer of the ship.

Q. If you were not in sight, they would look for you until they found you? A. Yes, sir.

(Testimony of Adrian Rolland Frederick)

Mr. Hon: That is all. I will stipulate this witness may be excused.

Mr. McHose: I think I will ask one more question.

Cross Examination (Resumed)

Q. By Mr. McHose: Do I understand that you felt with respect to any work that the shipyard was doing that you wouldn't — if the shipyard quit work and left the ship in some condition of danger — that you would do nothing about it?

A. No, sir. I considered my duties as a mate — or a part of the duties of a mate on board a ship is to see that there is no fire hazard and that the ship is secured and that [444] all fire-fighting equipment is ready for instant use, and that is what I did.

Q. Your duty also to the owners of that vessel would be to see that no condition was permitted to exist which would endanger the safety of the ship, isn't that true?

A. Yes, sir; that is true.

Mr. McHose: I think that is all.

Mr. Hon: That is all.

The Court: Are there any further questions?

Mr. Hon: No further questions.

Mr. Gallagher: That last question was a little ambiguous, I think.

Redirect Examination

Q. By Mr. Gallagher: When you talk about safety of a ship, you mean the ship itself?

A. The ship itself; yes, sir.

Q. Not whether the ship is safe for Coast Guardsmen but whether the ship itself is in danger?

A. That is what I mean to say.

(Testimony of Adrian Rolland Frederick)

Mr. Gallagher: That is all.

Mr. McHose: I would like to ask another question.

Recross Examination

Q. By Mr. McHose: Let's assume, Mr. Frederick, that the shipyard had been working on the ship and they had taken away a long section of railing alongside of the ship and they [445] had failed to put up any chain or any rope or anything along there, so that the side of the ship was open and anybody walking across it would fall down into that place, and you came on board the ship and found that condition was there. Would your testimony be that you would do nothing about it?

A. I wouldn't do anything about it if the yard crew was doing work there or near it or coming back. As to this hatch, I didn't know whether they were coming back at 12:00 o'clock at night, 8:00 o'clock or any other time. All I knew was they had knocked off and left the hatch open and I assumed they were coming back to work that night.

Q. Were you on the ship on Sunday?

A. No, sir.

Q. The next time you came back to the ship was Monday morning?

A. Yes, sir.

Q. And, while you were not on the ship, other ship's officers were on board?

A. Yes, sir.

Mr. McHose: That is all.

Mr. Gallagher: May the witness be excused?

The Court: You are excused.

Mr. McHose: May I ask whether your Honor expects us to argue the matter or brief it or what is your pleasure in that respect? [446]

Mr. Hon: I certainly don't think we ought to brief it. I don't think there is anything to brief.

Mr. McHose: I wouldn't go along with that. I am perfectly satisfied to either brief it or argue it, which ever you prefer. There are some questions of law.

The Court: There are questions of law but, yet, the issues are not very complicated; I mean the factual issues. The question is whether there is negligence on the part of either or both respondents.

Mr. McHose: I think we can certainly argue the factual matters.

The Court: We will see what will happen after you finish your evidence.

(Thereupon, a recess was taken until 10:00 o'clock a. m., Friday, February 14, 1947.) [447]

Los Angeles, California, Friday, February 14, 1947, 10:00 a. m.

(Same appearances.)

Mr. Gallagher: Captain Bengston, come forward, please.

OSCAR BENGSTON,

a witness for the respondent Tide Water Associated Oil Company, being first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Oscar Bengston.

Direct Examination

Q. By Mr. Gallagher: Where do you live, Captain?

A. San Francisco.

Q. What is your occupation?

A. Master mariner.

Q. In 1944, were you the master of the Frank G. Drum?

A. Yes, sir.



(Testimony of Oscar Bengston)

Q. And were you in charge of the vessel when it was brought into the Bethlehem Steel Company shipyard at San Pedro?      A. Yes, sir.

Q. While the vessel was at sea, was any work done in the port bunker tank?

A. It was cleaned out, washed out.

Q. And, after it was cleaned out, how was it rigged or left? [448]

A. The tank lid was left on its support, which left the tank lid at about a 45-degree angle, and there was some rope stretched around it also.

Q. Was that the condition of that bunker tank and the hatch when that ship was brought into the shipyard?

A. Yes, sir.

Q. Did it remain in that condition up until the time the shipyard workers commenced working on it?

A. Yes, sir.

Q. Captain, you were not on board at the time this accident happened, were you?      A. No.

Q. Can you tell us where the fire extinguishers were on that vessel?

A. Well, there was some under the forecastle head and some in the 'midships house part and some in the passageway, on the poop deck and engine room and fire room.

Q. Were there any portable fire extinguishers of any kind at any place where they would be exposed to the weather?      A. Not belonging to the ship.

Q. Do you know where the fire hydrants were located on the main deck?      A. Yes, sir.

Q. Where was the fire hydrant which was closest to the forward bulkhead of the after house? [449]

A. Which one of them?

(Testimony of Oscar Bengston)

Q. The closest to the bulkhead. How far away was it?

A. About 10 feet forward of the pump room.

Q. Captain, was there ever any canvas flap or cloth flap or any kind of a flap in place at either the forward end of the starboard passageway of the main deck or the forward end of the port passageway of the main deck on that vessel?      A. No.

Q. How far from the doors at the forward end of those passageways was the nearest light inside of the passageway?      A. About 15 feet.

Q. And had anything been done to those lights?

A. There was a metal shield on the forepart of the light so it would not show on deck.

Q. Captain, were there any flashlights aboard that vessel which people could get and use if they wanted to?

Mr. Hon: Just a minute. I object to that as being incompetent, irrelevant and immaterial. It has no connection with any issue in this case.

The Court: Sustained.

Q. By Mr. Gallagher: Will you tell us whether that vessel was under charter at the time it was in the yard?

A. It was on charter to W.S.A.

Q. That was a time charter? [450]

A. Yes.

Mr. Hon: I would think the charter would be the best evidence.

The Court: The charter is in evidence, isn't it?

Mr. Gallagher: I offered it but your Honor, I think, acceded to Mr. Hon's suggestion that it wasn't the time for me to do it. I have got it here now and I will offer it.

(Testimony of Oscar Bengston)

Mr. McHose: I object to it, if the court please. I don't care about its going in and I think it is completely irrelevant and immaterial. It has nothing to do with this case. The ship was under time charter to the War Shipping Administration. Now, your Honor probably is familiar with a time charter. That means that the War Shipping Administration simply had the right to tell that ship where it was going to go and what cargoes it would carry and things of that sort. But the ship was under the operation and control and management of the Associated Oil Company, and I don't think it can be said here that the War Shipping Administration has any responsibility in this case, and, unless it has, I don't see what is accomplished by introducing the charter party.

Mr. Hon: Your Honor, I am going to join in that statement of Mr. McHose's for this reason and another reason; that the undisputed evidence shows that the Tide Water, the respondent Tide Water Oil Company, employed Bethlehem to do the work on the hatch. Now, the only — [451]

Mr. McHose: Mr. Hon, there was no work being done on the hatch.

Mr. Hon: Well, at that particular place.

Mr. McHose: I think the evidence is very clear there was no work being done on the hatch.

Mr. Hon: That was the work, as I understand it, that was being done for Tide Water, down through the hatch. Is that true?

Mr. McHose: I don't like to have you say "through the hatch."

The Court: In the evidence that was introduced as to the work, that hatch opening was used for the purpose

(Testimony of Oscar Bengston)

of getting material down there to do the work in regard to the plates on the outside of the vessel, as I understand. Now, go ahead with your objection.

Mr. Hon: As I understand it, that particular work, where they had to use the hatch — that that was opened for the purpose of doing the work for Tide Water Oil Company. The work Tide Water employed Bethlehem to do was a work that was at or near the bunker hatch, where they had to use the bunker hatch to get to and from that.

The Court: That is the evidence. But what is your objection?

Mr. Hon: I don't see where the time charter would have any bearing on the issue unless it showed that the government [452] was having that particular work done.

The Court: What is the importance of that?

Mr. Gallagher: The importance of it, if your Honor please, is simply this. The libelant contends that he was an invitee by Tide Water Oil Company. That is the allegation in his libel. We deny that. The time charter is material at least for the purpose of showing that the United States Government, through the War Shipping Administration, was the entity which had the right to permit people to come aboard or to keep them off, and that the Tide Water Associated Oil Company had no right whatever to refuse admittance to anyone who was brought there or sent there by the charterer.

In other words, I take it to be the case that it is similar to running a home with a cook and a housekeeper, as I told your Honor the other day. The people who come into the house are not the guests of the owner of the home or the employer of the cook and housekeeper. They

(Testimony of Oscar Bengston)

are the guests of the person who rents the place and has the right to use it. The government had a right to come aboard and put anybody aboard it wanted to, but that wouldn't make the persons who came aboard invitees of the Tide Water Associated Oil Company.

The Court: The government wasn't directing the vessel at that particular time, no matter how many charters there were. [453]

Mr. Gallagher: The government controlled who could go aboard and who couldn't go aboard.

The Court: But there is nothing in the evidence to show that they exercised, under the time charter, that right.

Mr. Gallagher: They sent this man aboard.

The Court: But this is a merchant vessel owned by Tide Water and the work was ordered by Tide Water and the work was done by Bethlehem Steel Company. There is no evidence whatsoever that the United States Government directed the movements in any particular of that particular vessel at that particular time. Is there?

Mr. Gallagher: I am trying to introduce the evidence with respect to the time charter. I can't see how Tide Water Associated Oil Company had any power to keep this young man off of that vessel. And, if it had no power to keep him off, how could he be an invitee? He didn't come there at their invitation.

Mr. McHose: I think the fallacy of that is this, that this man did not come aboard as an employee of the time charterer. This man came aboard as the employee of the Coast Guard, another agency of the government, but not in any sense coming on board in connection with the time charterer. And I can submit authorities to your Honor,



(Testimony of Oscar Bengston)

if you wish them, although I think your Honor is ruling with us anyway, that the time charterer doesn't have any responsibility as far as [454] the responsibility of taking care of a ship which is in the possession and control of the owner, and merely time chartered to somebody for the purpose of carrying cargoes and going where that time charterer wants the ship to go, under the command of a captain employed here by the owner and with a crew employed by the owner, and in a situation where this ship was at the time this happened.

The Court: Furthermore, all of these employees of the vessel testified they received their pay, or at least some of them did, from the Oil Company, and that some of them were employed by the Oil Company for many years.

Mr. Gallagher: In the example that I gave to your Honor of the owner of a home, let's suppose your Honor wanted to rent your home and you agreed to furnish a cook and a housekeeper as part of the service and to pay them. You would still be paying them. They would be your employees. But the people who came into the house wouldn't be your invitees.

The Court: Maybe I don't understand the full legal effect of this charter. Does the United States merely have the first call on the movement of the boat?

Mr. Gallagher: It is a lease of the vessel, with the owner furnishing the crew. The charterer can use it for his own purposes. He can have parties on board the boat if he wants to and do what he chooses to do with it except to run it into the rocks. [455]

Mr. McHose: It might be helpful to the court, if you do not already understand, that there are two types com-



(Testimony of Oscar Bengston)

monly used of charters in connection with ships. One is a time charter. For instance, I own a ship and Mr. Gallagher wants to have a cargo taken to Europe and he makes a time charter of my ship, and I provide that ship. I have my own captain and my own crew and I provide the food and the fuel. I take my ship alongside of his dock and he loads his cargo in the ship and my captain still is in command of the ship and he takes the ship over to Europe and delivers the cargo.

The other kind of a charter is a bare boat charter. But we have only a time charter and the Associated Oil Company never gave over the responsibility for the control and operation of that ship to the United States Government. And, therefore, I think we are wasting time if we put in a charter party which, when your Honor reads it, you will find has no possible bearing on the issues here.

The Court: Let's see that. It should be marked for identification.

The Clerk: I will mark it respondent Tide Water's Exhibit H for identification.

Mr. Gallagher: I assume your Honor sustains the objection to the offer?

The Court: I would like to read and see just the effect of this instrument, or at least parts of it. It is a [456] long document. I am just wondering if you gentlemen, who are well versed in these matters, can point out to me the salient portions of this respecting the use of the ship. I notice the first clause is that "The vessel shall be placed at the disposal of the charterer at the port of delivery at such safe ready dock, wharf or place as the charterer may direct." That is the purpose, isn't it, of a time charter?

(Testimony of Oscar Bengston)

Mr. Gallagher: Yes, your Honor.

The Court: Does that tell the whole story?

Mr. McHose: He can tell where he wants the ship to go and things of that sort but the charterer never takes over the possession of that ship. It is always in charge of the master or the owner.

If the court please, I can cite you a case, "The Spokane," which is 494 Fed. 242, which specifically held that the owner of a vessel could not relieve himself from responsibility by delegating it to the time charterer. In that case there was a time charter and an employee of a construction company, which was making repairs on the ship, was injured when he slipped on a greasy deck, and the shipowner was held liable and the time charterer, who was impleaded by the shipowner under the 56th Admiralty Rule, was held not liable.

And another case, in which I think that same point arose, is in 266 Fed. 200. [457]

Here is what the court said in the Spokane case, "When the vessel contracted with the construction corporation for the repairs, it assumed the obligation to keep all parts of the ship under its control reasonably safe for the employees of the construction corporation. It could not relieve itself of this duty by delegating it to the time charterer."

Mr. Hon: As I understand, Mr. McHose, isn't it true that, under a time charter, the owner of the boat retains all of his own employees and his own employees operate the boat, and the only thing that the person chartering the boat gets is just the services of these people?

Mr. McHose: The service of the ship.

(Testimony of Oscar Bengston)

Mr. Hon: But, if a bare boat charter was made, the owner would keep everything, is that right?

Mr. McHose: It is like when you go into a hotel room. You get the service and, if anything happens in that room, you are not responsible for it.

Mr. Hon: In other words, a time charter is a vessel that is placed at the disposal of a party and, if used under that charter, then the user will pay the stipulated cost?

Mr. McHose: That is right. And the owner is required, among other things, to keep the vessel in repair. That is why the ship was in the yard. The testimony is quite clear that the contract for repairs was with the Associated Oil Company and the bills were to go to the Associated Oil Company. [458]

The Court: There is nothing in the record to show that the United States Government or the War Shipping Board was directing or exercising any control over this particular vessel at the time. On the contrary, the proof thus far negatives any control other than that which has been testified to. The situation might be different had this vessel at that particular time been subject to the control as stated in the charter, that is to say, at that particular time. There is some evidence here that the United States Government had ordered the use of the vessel at that time.

Mr. Gallagher: Your Honor will recall the evidence that the War Shipping Administration ordered some of this work, not on this port bunker tank, but there was some work being done while the vessel was there in that yard, ordered by the charterer, the War Shipping Administration.

(Testimony of Oscar Bengston)

The Court: I think that is true. We didn't go into that and I don't know what that was. There was some correspondence there as to an additional order, in addition to the one given by the Oil Company, for some additional work.

Mr. McHose: Your Honor, I can explain that. We didn't go into details on that because it didn't seem material. But what was actually happening was this. The War Shipping Administration was about to take over this ship under a bare boat charter. They had had it under time charter and the time charter was being terminated and, under the government practice, [459] which I happen to be familiar with, the War Shipping Administration would terminate the time charter and redeliver the ship under the time charter and then take it over under a bare boat charter, at which time the War Shipping Administration would provide the crew and take over full responsibility for the ship. That was going to be done and the ship was then going to be turned over to the United States Navy after the repairs had been completed. But, before that would be done in this case here, the War Shipping Administration required the owners to make these repairs. These were annual repairs which the owner had to make. And what actually did happen, as I understand it, was that, after these repairs were completed, the War Shipping Administration did take over the ship under a bare boat charter, but the accident happened before that had occurred and while the time charter was still in effect.

The Court: I didn't understand that any of the work that was done in this hatch or in this bunker had anything to do with any other work ordered by the Tide Water Oil Company, so far as securing plates.

(Testimony of Oscar Bengston)

Mr. McHose: Take Mr. Courtiour's testimony and Mr. Harrington's testimony and it is to that effect.

The Court: The offer is denied.

Mr. Gallagher: Your Honor, if it is necessary to save an exception, I, respectfully, take one. [460]

The Court: It may be noted.

Q. By Mr. Gallagher: Captain, how long was that vessel withdrawn from navigation in 1944?

Mr. McHose: What do you mean by "withdrawn from navigation"?

Q. By Mr. Gallagher: While it was in the shipyard being repaired, it wasn't being navigated?

A. It wasn't possible to navigate it.

Mr. McHose: Do you mean how long was it up in the shipyard?

Q. By Mr. Gallagher: How long was it in the shipyard, without any power, without its machinery in operation?

A. Between three and four weeks.

Mr. Gallagher: That is all.

#### Cross Examination

Q. By Mr. Hon. Just one question, Captain. This accident happened between 9:00 and 9:30 p. m. on August 6, 1944. That was a Sunday night. When was the last time you were on the boat prior to that time?

A. As near as I remember, it was the day before.

Q. The day before? A. Yes.

Q. And that would have been say about 30 hours or better before that, is that right? Well, it was in the daytime, on Saturday — [461]

A. Yes, sir; about that.

Mr. Hon: That is all.



(Testimony of Oscar Bengston)

Cross Examination

Q. By Mr. McHose: Captain, Mr. Gallagher asked you a question about flashlights, to which the court sustained an objection. If Mr. Richardson, a member of the Coast Guard, had gone to one of the ship's officers and requested a flashlight to make an inspection of the ship, were flashlights available that might have been furnished him?

Mr. Hon: I object to that as highly speculative. It calls for a conclusion of the witness and is calling for testimony not within the issues of the case and calls for something that wouldn't be binding upon the libelant in this case. And there must be some foundation laid showing there was some duty upon Richardson in that respect.

Mr. McHose: If your Honor please, we have here a question of negligence. It is our prime conviction that Mr. Richardson was negligent in this case. If he had had a flashlight in his hand and had not used it, I would think the court would say that was a very definite negligent act. If there were flashlights on board the ship which he could have obtained to make an inspection, and he could merely go to the mate and ask for one, and if there were flashlights available on the ship, I think that is a matter that is important to the court in deciding whether Richardson was negligent. I think [462] it is quite material evidence. That is not speculative and it is not calling for a conclusion. The Captain will either know or not know whether there were flashlights available and we think it is proper evidence and should be admitted.

The Court: I think it is speculative, whether flashlights and illumination were available. Do you want to



(Testimony of Oscar Bengston)

go into that? I think the court has to take into consideration only those things that did happen.

Mr. McHose: Yes but, if Mr. Richardson had done what he should have done, this accident never would have happened.

The Court: That is a matter of argument.

Mr. McHose: It is also important to the court to know whether there were facilities available to him and I want to bring out whether those facilities were on that ship and available.

Mr. Hon: You would have to show that he had that knowledge.

Mr. McHose: Anybody, with any grain of sense, who boards a ship, knows that flashlights were available.

Mr. Hon: He had enough sense to get in the Coast Guard.

The Court: The fact that he didn't have or use a flashlight we know to be a fact.

Mr. McHose: That is right.

The Court: He didn't use anything and it is for the court to determine whether or not that situation constituted [463] any degree of negligence on the part of Richardson, and that is a matter for the court to determine.

Mr. McHose: That is right and, also, the court could determine, as a part of that, whether there were other flashlights available which he could have gotten.

The Court: That is speculative. The objection is sustained.

Q. By Mr. McHose: Captain, the bunker hatch had to be open in order for work to be done down in the bunker tank, did it not? A. Yes, sir.

(Testimony of Oscar Bengston)

Q. And, after it had been opened and the tank had been gas freed, it had to remain open for ventilation purposes, is that correct?      A. Yes.

Q. Now, as a matter of fact, was the whole ship gas freed, Captain?      A. Yes.

Q. All your tanks had to be certificated as free of gas before you could do work in the shipyards?

A. Yes, sir.

Q. And that was done on this occasion?      A. Yes.

Q. Are there quite a number of hatches leading into tanks similar to this hatch here on the deck of this ship? [464]

A. Yes; there is 28 cargo hatches similar to that.

Q. Substantially one at every hatch?

A. That is right.

Q. Captain, were you familiar with the port security regulations of the United States Coast Guard, that were in effect at the time this accident happened?

A. Yes, sir.

Q. Did you provide the guards that were called for by those regulations, while the ship was in the shipyard?

Mr. Gallagher: That is objected to, your Honor, upon the ground it is immaterial. Those guards are required for the purpose of safeguarding the ship, and whether they were there or not wouldn't have any proximate causal connection with any injuries sustained by Mr. Richardson.

Mr. McHose: That is a matter of argument, your Honor. The regulations of tank vessels, which have already been placed in evidence, show what the purposes are.

The Court: Will you read the regulation?

(Testimony of Oscar Bengston)

Mr. McHose: "While alongside docks, tankships will maintain armed guards at all times as follows: The armed guards may be of the crew or of an approved organization from ashore." And then it goes into patrol. There is one guard to patrol the vessel's offshore side and it specifies his duties, an armed guard keeping the ship's gangway in view and a roving guard to patrol through the vessel. And [465] there is provision here as to what equipment the guards shall have and there is a provision which says, "Guards on tankships will be instructed as to their duties. They will be limited to men of satisfactory vision, hearing and vigor. They will be responsible to resourcefully safeguard the premises from jeopardies that become apparent, though not ordered in their specific task. One of the guards on duty shall be designated as the chief guard."

I also read to your Honor from Title 33 of the Code of Federal Regulations. These are the regulations promulgated nationally, as distinguished from the tank vessel regulations promulgated locally, and these rules go into detail as to what guards shall be on board ships and what guards shall be on board ships at certain times and with respect to roving guards. It states what equipment they shall have. It says this, "All guards, other than those of the Military and Naval forces of the United States, shall, when on duty, have the following equipment:

"(a) A copy of the regulations contained in this subpart, a Coast Guard identification card endorsed 'Guard' by the captain-of-the-port, a badge or other insignia, a flashlight, a police club and a police whistle."

And it goes into details as to what the duties of the roving guard are, and, among other things, it states this, "Duties of Roving Guard: [466]

(Testimony of Oscar Bengston)

“(1) To patrol continuously from one end of the ship to the other or, within the confines of the area prescribed by the chief guard, and to observe on these rounds the security of accessible spaces for the detection of fire, disorder, violation of security regulations and the presence of unauthorized persons.”

It also contains other things. And I read, specifically, paragraph 5, “To inspect spaces in which workmen are engaged or from which they have recently departed.”

And I think it is proper to ask the captain of this ship whether those guards called for by law were provided.

The Court: The question is whether they were employed?

Mr. McHose: I didn't read one other thing which I should have, your Honor. This, specifically, says that these guards shall be provided by the master. Section 6.332 reads, “The master, vessel owner, operator, and agent shall provide all guards required by the regulations contained in this sub-part except where such guards are provided by military authority.” [466a]

The Court: What rules are those that you read from?

Mr. McHose: They are from the Code of Federal Regulations, what are called Port Security Regulations, issued by the United States Coast Guard, under authority of the Secretary of the Navy, who, in turn, acted under the authority of the President of the United States, under the War Powers Act.

The Court: And these have the force of law?

Mr. McHose: They have the force of law. They were in effect during the war and they have now gone out of effect.

(Testimony of Oscar Bengston)

The Court: And during this particular time?

Mr. McHose: And at this particular time.

The Court: Do you concede that to be a fact?

Mr. Gallagher: These are the same regulations which we discussed the other day, and I called to your Honor's attention respondent Tide Water's contention that these regulations do not provide any standard of check which is acceptable in a civil action for damages. And these guards are not required for the purpose of doing anything excepting to see that they don't steal the ship or burn it up or cut it loose, and there isn't anything in here which refers to a situation like we have in the case at bar, where a ship is in a shipyard. These security regulations are, obviously, for the purpose of protecting the ship while it is moored at an ordinary dock and either taking on cargo or discharging cargo or getting ready to sail some place. [467]

Mr. McHose: That isn't the objection. The regulations are applicable to all vessels and they so provide. I will give you the exact citation of this.

The Court: I think we ought to have it in the record.

Mr. McHose: It is found in the Code of Federal Regulations of the United States Government, Cumulative Supplement, Titles 33 to 45. It is a part of Title 33, "Navigation in Navigable Waters," which is sub-part E. The security regulations for vessels in port, page 9594, I have read to your Honor; I mean all of the pertinent portions. Section 6.322 is the Manning of Vessels in Port and that covers the requirements of vessels both in service and out of service. The subsequent section is the guarding of vessels, Section 6.330, on page 9596, and the duties of guards is found in Section 6.337, on



(Testimony of Oscar Bengston)

page 9597, and the duties of roving guards, which I read to you, is found on page 9598. There are quite a number of regulations. And these regulations were printed in the form of pamphlets which were distributed, and the little pamphlet which I showed to the officer yesterday is a copy of these regulations.

The Court: Is that pamphlet in evidence now?

Mr. McHose: No; I don't think it is necessary to put it in because it is a matter of law, your Honor. These are laws of the United States.

The Court: And you have quoted from the sections in full, [468] have you?

Mr. McHose: I have quoted from pertinent sections. This document of regulations for tank vessels, which was introduced in evidence as Libellant's Exhibit 6, is a local thing which was prepared by the local Coast Guard people and is supplemental, as I understand it, as Admiral Higbee testified. This document, Section 34, provides substantially the same thing that I read here. "Tankships temporarily unmanned and immobilized for extensive repairs. The master, owners, agents, and other responsible persons will safeguard tankships in such status by all practicable means. Unless otherwise required by the Captain of the Port, there will at all times be one licensed officer on board. In addition, the three guards required by Paragraph 6 will at all times be actively on duty for every tankship of more than 3,000 gross tons." [469]

That is merely a restatement of what is in the Federal Regulations.

The Court: The question that was asked is what? I have lost track of it.



(Testimony of Oscar Bengston)

Mr. McHose: I, first, asked the Captain whether he was familiar with the Port Security Regulations and whether such guards were employed.

The Court: And there was an objection to that question?

Mr. Gallagher: Yes, your Honor.

The Court: You may answer.

Mr. Gallagher: We will take an exception.

A. The regulations were observed.

Q. By Mr. McHose: And the guards were employed?

A. Yes, sir.

The Court: Do you still object to the question?

Mr. Gallagher: Yes, your Honor, because I don't think the presence or absence of guards is of any materiality or would furnish any basis whatever of civil liability. They were not promulgated for that purpose. I think Congress is the only body which could enact any law which would set up a standard of conduct which must be observed and which would furnish a basis of civil liability.

Mr. McHose: If the Court please, Congress has acted. Congress passed the War Powers Act and empowered the President to make regulations, and that is just what was done. [470]

Mr. Gallagher: Suppose the President had issued an ukase saying that all shipowners in the United States shall be liable for injury which is sustained by any person who comes aboard such vessel, whether the shipowner is negligent or not. I don't think there is anybody in the courtroom who would contend that the President of the United States would have the slightest au-

(Testimony of Oscar Bengston)

thority to issue any such edict, whether it is in time of war or time of peace. That is the particular point which I am trying to convey to your Honor.

The Court: It would bear on the question of negligence the same as the law, for example, that says that a man shall not exceed 50 miles in speed, and, if he does, that certainly is significant in a civil damage action. And it also would apply in a criminal prosecution in that particular instance. I don't see the difference. Here there is a regulation regulating the conduct in the operation of vessels, and, if there is any non-compliance, it would seem to me that a violation would have some bearing in a civil or a criminal action, either one.

Mr. Gallagher: Well, of course, your Honor is familiar with the rule that a criminal suit is not per se a basis of civil liability. The civil liability is predicated either upon the general maritime law or statutes adopted by Congress and these regulations — well, I have already pointed out to your Honor what our contentions are. I think there are a good [471] many authorities which can be called to your Honor's attention and which I will call to your Honor's attention.

The Court: May I interrupt you? I am going to call a recess for a few moments for a matter that is coming up.

(Short recess.)

The Court: You were about to conclude your objection.

Mr. Gallagher: I think I was merely going to refer to the fact that I had already outlined the position I took with reference to these regulations in re guards, and the only thing I could add to it would perhaps be to brief it for the court.

(Testimony of Oscar Bengston)

The Court: I think I have already ruled on it, and the ruling will stand.

Q. By Mr. McHose: I have two other questions, Captain. In order to do the work in the tank — or perhaps I did ask you this question. It was necessary to have the bunker hatch open, wasn't it? In order to do the work down in the bunker tank and get the equipment down there to do it with, it would be necessary to open the hatch, would it not?

A. Yes, sir.

Q. So it would have to be open for that purpose as well as for ventilation?

A. Yes, sir.

Q. You don't know yourself who removed the rods out of that bunker hatch, do you? [472]

A. No.

Q. You didn't see that done?

A. No; I didn't see it.

Mr. McHose: That is all.

Mr. Hon: No questions.

Mr. Gallagher: The respondent rests.

Mr. McHose: We rest.

Mr. Hon: No rebuttal.

Mr. Gallagher: May the Captain be excused, your Honor?

The Court: Yes; he may be excused.

The Court: Are there any unfinished offers or any pending matter that hasn't been ruled on?

Mr. McHose: I don't think of any.

Mr. Hon: I don't think so, your Honor.

The Clerk: Do you want to sign this?

Mr. Hon: Yes. This is the amendment to the libel that we stipulated yesterday could be filed.

The Court: Would you gentlemen like to demonstrate the course that he took from this particular point?

Mr. McHose: Yes.

Mr. Gallagher: I would like to have the court take a look at the inside of this port passageway for the purpose of pointing out any hooks or holes.

The Court: Is it possible to open this hatch cover?

Mr. Gallagher: No, your Honor.

Mr. Hon: I also want the record to show that, at about 25 or 30 feet aft of the port exit in question, there is another fire hose attached to the starboard side of the passageway.

The Court: Is it satisfactory that one of you demonstrate the steps that he is alleged to have taken at this particular point, before he fell in at the opening?

Mr. McHose: That is all right as far as I am concerned.

Mr. Hon: Yes. [476]

Mr. Gallagher: All we could do would be to demonstrate our contentions.

Mr. McHose: Mr. Hon can demonstrate for the libelant and you for the respondent.

Mr. Gallagher: Mr. Hon and Mr. Feintech have demonstrated, when each of the proctors for the libelant came out of the passageway, that he crossed his left leg over so that he actually stepped with his left foot to the right of the place where his right foot was on the inside.

The Court: I didn't observe that closely. So, will one of you gentlemen make that demonstration?

Mr. Hon: Yes.

The Court: Demonstration made by Mr. Feintech by taking a step over the coaming with his left foot and then bringing over the right.

Mr. McHose: I think we might mention that Mr. Feintech is considerably larger than Mr. Richardson.

Mr. Hon: Then, I will do it.

The Court: Now, you gentlemen can demonstrate if you want to.

Mr. Gallagher: Isn't the Judge about the same height as Richardson?

Mr. Hon: Yes.

Mr. Gallagher: I think your Honor could make the step.

Mr. Feintech: In bringing my left foot out, it was neces- [477] sary for me to step over a coaming that was about 20 inches high; and, likewise, in bringing my right foot out, my foot was lifted over the coaming that was 20 inches in height.

Mr. Gallagher: And stretching the right foot in order to get it inside of the hatch coaming.

Mr. McHose: I think we should mention these other obstructions; that, if he had taken another step, he would have bumped into this valve.

The Court: Let's see Mr. Gallagher make the demonstration.

Mr. Gallagher: You try it and, if you don't make an effort to put your foot over there—you have to make a long step, a long goose step.

Mr. Hon: How high is this?

Mr. Gallagher: About 18 inches.

Mr. Hon: It is higher than that.

The Court: It is about two feet.

Mr. Hon: I have to raise my foot at least two feet and that is not a long step. You have a 30-inch stride in the Army and that clears it by eight inches.

The Court: I have seen it.

Mr. McHose: Mr. Gallagher, we also probably should point out the surroundings here to the Judge. There are no fire extinguishers here now.

Mr. Hon: And, also, let's point out that you can easily go [478] over here without going on the catwalk. Of course, if you open this up—I can't do it.

Mr. Gallagher: Close your eyes and go across there, so it will be dark.

The Court: This is not an exact demonstration. Will you open one of these hatches so I can see in it? I want to see down in the hatch. When this is open, where are the stanchions?

Mr. Gallagher: Here are the stanchions.

Mr. McHose: There is no evidence in this case there were any stanchions.



Mr. Gallagher: Will you stipulate that the longitudinal member closest to the port side of the bunker hatch is about eight inches from the port side of the bunker hatch?

The Court: About how wide is it, the member?

Mr. Gallagher: It is about three inches wide, that is, the top surface.

The Court: I think that is all. Thank you. Let the record show that the matter is now submitted.

[Endorsed]: Filed Oct. 8, 1947. [479]

[Endorsed]: No. 11757. United States Circuit Court of Appeals for the Ninth Circuit. Tide Water Associated Oil Company, a corporation, Appellant, vs. David Lawton Richardson and Bethlehem Steel Corporation, a corporation, Appellees. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 14, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11757

TIDE WATER ASSOCIATED OIL COMPANY, a  
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and  
BETHLEHEM STEEL COMPANY, a corporation,  
Appelles.

STATEMENT OF POINTS ON WHICH APPEL-  
LANT INTENDS TO RELY ON APPEAL AND  
DESIGNATION OF PARTS OF RECORD  
NECESSARY FOR THE CONSIDERATION  
THEREOF

Appellant adopts as its points on appeal the Assignments of Error appearing in the transcript of the record in this case.

Appellant requests that the record as certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be printed in its entirety.

Dated: October 17th, 1947.

LASHER B. GALLAGHER  
Proctor for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 20, 1947. Paul P. O'Brien,  
Clerk.